THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North Gall.

BOUND BY WOOD, LONDON

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—H. F. DICKENS, Esq., K.C.
Vice-Chairman—T. R. HUGHES, Esq., K.C.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR GORDON HEWART, M.P., ATTORNEY-GENERAL.
SIR E. M. POLLOCK, M.P., SOLICITOR-GENERAL.
CHARLES HENRY MORTON, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. TOMLIN, Esq., K.C. W. R. SHELDON, Esq.	Lincoln's Inn.
H. F. DICKENS, Esq., K.C. SIR HUGH FRASER.	Inner Temple.
C. C. SCOTT, Esq., K.C. A. MACMORRAN, Esq., K.C.	Middle Temple.
SIR LEWIS COWARD, K.C. EDWARD CLAYTON, Esq., K.C.	Gray's Inn.
T. R. HUGHES, Esq., K.C., of Lincoln's Inn. E. W. HANSELL, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. MELMOTH WALTERS, Esq. (Firm—Messrs. Walters & Co.). J. W. BUDD, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. NOBLE FAWCETT, Esq., 30, Montague Street, W.C. 1.

1920.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

Court of Appeal . .	G. A. STREETEN, W. IVIMEY COOK,	*Barristers-at-Law.*
Probate and Divorce .	J. R. BROOKE,	*Barrister-at-Law.*
Admiralty Cases . .	E. C. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases .	C. F. JEMMETT,	*Barrister-at-Law.*

1920.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

BIBL.
LONDIN.
UNIV.

JUDGES

OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1920.

Sir H. E. Duke, President.
Sir Maurice Hill, Knt.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1920

JUDGES

OF

THE COURT OF APPEAL.

1920.

Lord BIRKENHEAD, Lord Chancellor.

Earl of READING, Lord Chief Justice of England.

Lord STERNDALE, Master of the Rolls.

Sir J. ELDON BANKES,
Sir T. ROLLS WARRINGTON,
Sir T. E. SCRUTTON,
Sir J. R. ATKIN,
Sir R. YOUNGER,
} Ordinary Judges of Court of Appeal.

Sir H. E. DUKE, } President of the Probate, Divorce, and Admiralty Division.

ERRATA.

Page	*Line*	*For*	*Read*
149	footnote (1)	33 L.J. (P.) 17, 19.	*Ante*, pp. 17, 19.
156	3 lines from bottom	Barnes P.	Horridge J.
432	footnote (2)	*Ante*, p. 290.	*Ante*, p. 209.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1920, will be as follows :—

In the First Series,
[1920] 1 Ch. [1920] 2 Ch.

In the Second Series,
[1920] 1 K. B. [1920] 2 K. B. [1920] 3 K. B. [1920] P.

In the Third Series,
[1920] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Adams *v.* Adams	126
Adolph, The	333
Alfred Nobel, The	319

B.

Barratt *v.* Barratt	126
Battle of Jutland, The	408
Bernisse (The) and The Elve	1
Best *v.* Best	75
Betton-Bright *v.* Betton-Bright (C. A.)	338
Björnstjerne Björnson, The	319
Burne *v.* Burne	17
Butterworth *v.* Butterworth	126

C.

Cairnsmore, The	209
Cedric, The	193
Ceylon, The	187
Charles le Borgne, The	15n
Charlotte, The	78
Chelston, The	400
Coleman *v.* Coleman	71
Collins *v.* Collins	126
Consul Olsson, The	43
Cramp *v.* Cramp	158
Creteforest, The	111

D.

Danube II., The	104
Dirigo, The	425
Disperser, The	228
Domald, The	56
Drottning Sophia, The	200

E.

Einar Jarl, The	64n
Ellworthy *v.* Ellworthy	126
Elve (The) and The Bernisse	1
Espanoleto, The	223

F.

Feldmarschall, The	289
Fyffe *v.* Fyffe	310

G.

Godman *v.* Godman (C. A.)	261
Goodman *v.* Goodman	67
Gunda, The	209

H.

PAGE

Hobbs *v.* Hobbs 40
Howell *v.* Howell 126

K.

Kafue, The 15n
Karamea, The 314
Kim, The 319

L.

Langrick *v.* Langrick 90
Llandovery Castle, The 119
Luna, The 22

M.

MacLulich *v.* MacLulich (C.A.) 439
Marie Gartz, The 172
——— (No. 2) The 460
Morgana, The 442

O.

Oscar II, The 363

P.

P.L.M.8, The 236
Pellworm, The 347
Perry *v.* Perry 361
Porto Alexandre, The (C. A.) 30
Prins der Nederlanden, The 216

Q.

Quinn *v.* Quinn 65

R.

PAGE

Rannveig, The 177
Rush *v.* Rush (C. A.) 242

S.

St. George-in-the-East (Rector and Churchwardens) *v.* Parishioners 97
St. Mary, Northolt (Vicar and Churchwardens) *v.* Parishioners 97
Smith *v.* Smith 206
Spendley *v.* Spendley 40

T.

Tranmere, The 454
Turid, The 370
Twee Ambt, The 413

U.

United States, The 430

V.

Valeria, The 81
Veraston, The 12
Vesta, The 385
Volturno, The 447

W.

Williams *v.* Williams 69
Wilson *v.* Wilson 20

TABLE OF CASES CITED.

A.

		PAGE
Abbot *v.* Peters	4 Hagg. Ecc. 380	283
Acteon, The	2 Dods. 48	184
Adonis, The	Unreported	204
———	5 C. Rob. 256	331
Adriatic, The	85 L. J. (P.) 12	27
Aktieselskab Helios *v.* Ekman	[1897] 2 Q. B. 83	371
Alexander, The	4 C. Rob. 93	331
Alfred Nobel, The	[1918] P. 293	324
Alwina, The	[1916] P. 131	415
Anna, The	5 C. Rob. 373	82, 358
Anne, The	3 Wheat. 435	85, 351
Argentino, The	13 P. D. 191	13
Ariel, The	11 Moo. P. C. 119	388
Ash *v.* Ash	[1893] P. 222	343
Asia Grande, The	Edw. 45	436

B.

Baker *v* Baker	[1908] P. 257	243
Baltica, The	11 Moo. P. C. 141	388
Banda and Kirwee Booty	L. R. 1 A. & E. 109	291
Bangor, The	[1916] P. 181	82, 352
Barry *v.* Van den Hurk	[1920] 2 K. B. 709	448
Barwick *v.* Mullings	2 Hagg. Ecc. 225	281
Bawean, The	[1918] P. 58	387
Beeby *v.* Beeby	1 Hagg. Ecc. 789	159
Belgia, The	[1919] P. 41	301
Bell *v.* Bell	1 Sw. & Tr. 565	146
Bellcairn, The	10 P. D. 161	233
Bennett *v.* Jackson	2 Phillim. 190	266
Benney *v.* Fitzgerald	Unreported	107
Benning *v.* Ilford Gas Company	[1907] 2 K. B. 290	114
Bernstein *v.* Bernstein	[1893] P. 292	129, 160
Berthon *v.* Cartwright	2 Esp. 480	130
Betsey, The	1 C. Rob. 93	4, 83
Biggs *v.* Dagnall	[1895] 1 Q. B. 207	208
Bikker *v.* Bikker	67 L. T. 721	147
Bilby *v.* Bilby	[1902] P. 8	18, 156
Birchall *v.* Pugin	L. R. 10 C. P. 397	463
Birt *v.* Barlow	1 Doug. 171	127
Blandford *v.* Blandford	8 P. D. 19	160
Blewitt *v.* Blewitt	4 Hagg. Ecc. 410	268
Bone *v.* Spear	1 Phillim. 345	282
Boyer *v.* Boyer	[1908] P. 300	243
Bradford *v.* Young	29 Ch. D. 617	266
Bradley *v.* Bradley	3 P. D. 47	313
Bragge *v.* Dyer	3 Hagg. Ecc. 207	282
Brenda Steamship Company *v.* Green	[1900] 1 K. B. 518	372
Brereton *v.* Edwards	21 Q. B. D. 488	426
Brierley *v.* Brierley	[1918] P. 257	76

		PAGE
Briggs *v.* Light Boats	93 Mass. 157	35
Brockelbank *v.* Brockelbank	27 Times L. R. 569	66
Brown *v.* Wildman	28 L. J. (P. & M.) 54	66
Browning *v.* Browning	[1919] W. N. 28	362
Brydges *v.* Brydges	[1909] P. 187	73
Brymer *v.* Atkins	1 H. Bl. 164	53
Bulley *v.* Bulley	8 Ch. D. 479	428
Burke *v.* South Eastern Railway Company	5 C. P. D. 1	25
Burne *v.* Burne	[1920] P. 17	149
Burnock, The	12 Asp. M. L. C. 490	114
Burrows *v.* Burrows	1 Hagg. Ecc. 109	276
Burton *v.* Collingwood	4 Hagg. Ecc. 176	282

C.

Cairnbahn, The	[1914] P. 25	195
Cairnsmore, The	[1920] P. 209	432
Calamy *v.* Hyde	1 Lee, 423n.	286
Calcraft *v.* Harborough (Earl)	4 C. & P. 499	138
Caliph, The	[1912] P. 213	106, 225
Campbell *v.* Campbell	Dea. & Sw. 285	169
Cape of Good Hope, The	2 C. Rob. 285	291
Cardiff Steamship Company *v.* Jameson	9 Asp. M. L. C. 367	373
Carl Walter, The	4 C. Rob. 207	53, 394
Carlotta, The	[1899] P. 223	189
Carolina, The	4 C. Rob. 256	331
Carryer *v.* Carryer	4 Sw. & Tr. 94	245
Cary *v.* Askew	1 Cox, 241	266
Catherine and Anna, The	4 C. Rob. 39	83, 210, 436
Chapman *v.* Chapman	[1910] P. 279	243
Charkiah, The	L. R. 4 A. & E. 59	32
Charles le Borgne, The	[1920] P. 15n.	14
Cobbold *v.* Baas	4 Ves. 200n. (*b*)	285
Cole *v.* Mordaunt	4 Ves. 195n.	279
Collins *v.* Collins	9 App. Cas. 205	164
Comyn *v.* Comyn	32 L. J. (P.) 210	138
Cooke *v.* Wilson, Sons & Co.	85 L. J. (K. B.) 888	25
Cooper *v.* Green	2 Add. Ecc. 454	66
Copenhagen, The	1 C. Rob. 289	57
Copsey *v.* Copsey	[1905] P. 94	164
Cowing *v.* Cowing	33 L. J. (P.) 149	143
Cox *v.* Cox	[1906] P. 267	129
Crocker *v.* Crocker	36 Times L. R. 216	163
Cunningham *v.* Cunningham	77 L. T. 405	72

D.

D'Aguilar *v.* D'Aguilar	1 Hagg. Ecc. 773.	159
Daimler Company *v.* Continental Tyre and Rubber Company	[1916] 2 A. C. 307	387
Dallow *v.* Garrold	14 Q. B. D. 543	463
Dalrymple *v.* Campbell	[1919] P. 7	283
Danckebaar Africaan, The	1 C. Rob. 107	393
Darbishire *v.* Darbishire	62 L. T. 664	135
Deck *v.* Deck	2 Sw. & Tr. 90	248
Dent *v.* Dent	4 Sw. & Tr. 105	162
Der Mohr, The	4 C. Rob. 314	82

		PAGE
Dictator, The	[1892] P. 304	121
Di Ferdinando *v.* Simon	[1920] 2 K. B. 704; [1920] 3 K. B. 409	448
Dingle *v.* Dingle	4 Hagg. Ecc. 388	283
Dirigo, The	[1919] P. 204	323, 388, 425
Dobson *v.* Dobson	[1916] P. 110	243
Dordrecht, The	2 C. Rob. 55	291
Douglas *v.* Smith	3 Knapp, 1	265
Doyle *v.* Kaufman	3 Q. B. D. 7, 340	226
Drennan *v.* Andrew	L. R. 1 Ch. 300	208
Durant *v.* Durant	1 Hagg. Ecc. 733.	167
Düsseldorf, The	[1919] P. 245	82, 351

E.

Edward and Mary, The	3 C. Rob. 305	349
Einar Jarl, The	[1920] P. 64n.	57
Ellis *v.* Ellis	4 Sw. & Tr. 154	162
Elsden *v.* Elsden	4 Hagg. Ecc. 183	266
Emanuel, The	1 C. Rob. 296	218
Ettrick, The	6 P. D. 127	230
Evans *v.* Evans	[1899] P. 195	135
Everett *v.* Everett	[1919] P. 298	160
Eyles *v.* Eyles	1792 Hil. Term, By-Day	272

F.

Fairfax *v.* Fairfax	25 Times L. R. 213	252
Forster *v.* Forster	33 L. J. (P.) 150n.	143
Franciska, The	10 Moo. P. C. 73	211
Friends, The	Edw. 246	57
Friendship, The	6 Rob. 420	331

G.

Galen, The	2 Dods. 19	292
Gardner *v.* Gardner	17 Times L. R. 331	134
Gattward *v.* Knee	[1902] P. 99	266
Gayer *v.* Gayer	[1917] P. 64	67
Gaynor *v.* Gaynor	31 L. J. (P. & M.) 116	247
Gemma, The	[1899] P. 285	121
Genoa and Savona	2 Dods. 444	291
Gibson *v.* Gibson	22 Times L. R. 361	135
Gillow and Orrell *v.* Bourne	4 Hagg. Ecc. 192	264
Glasgow Navigation Company *v.* Howard	15 Com. Cas. 88	372
Goede Hoop, The	Edw. 327	184
Grange *v.* Grange	[1892] P. 245	247
Greer *v.* Young	24 Ch. D. 545	428
Gregory *v.* Torquay Corporation	[1912] 1 K. B. 442	124
Grinham *v.* Grinham	[1916] P. 1	208

H.

Haines *v.* Schultz	50 New Jersey L. R. 481	136
Hakan, The	[1916] P. 266; [1918] A. C. 148	179, 220, 321, 415
Hall *v.* Hall	64 L. T. 837; 60 L. J. (P.) 73	160

		PAGE
Hallingdal, The	[1919] P. 204	203
Hamborn, The	[1919] A. C. 993	387
Hare, The	[1904] P. 331	189
Harris *v.* Great Western Railway Company	1 Q. B. D. 515	25
Harrison *v.* Harrison	Not reported	340
Hattatt *v.* Hattatt	4 Hagg. Ecc. 211	267
Hayton *v.* Irwin	5 C. P. D. 130	373
Heim, The	[1919] P. 237	57
Henfrey *v.* Henfrey	2 Curt. 468	267
Herne, In the Goods of	1 Hagg. Ecc. 222	266
Hertha, The	Unreported	301
Hewett *v.* Barr	[1891] 1 Q. B. 98	226
Hillerod, The	[1918] A. C. 412	323
Hines *v.* Hines	[1918] P. 364	21
Hohenzollern, The	[1906] P. 339	52
Holland *v.* Holland	[1918] P. 273	21
Holman *v.* Wade	*The Times*, May 11, 1877	370
Hoogskarpel, The	2 Dods. 350	291
Hook *v.* Hook	[1917] P. 56	21
—— *v.* ——	1 Sw. & Tr. 183	245
Houghton *v.* Houghton	[1903] P. 150	160
Hubberfield *v.* Browning	4 Ves. 200n. (*a*)	285
Huntington *v.* Huntington	2 Phillim. 213	266
Hurley *v.* Hurley	[1891] P. 367	339
Hyde *v.* Hyde	3 Ch. Rep. 155; 1 Eq. Cas. Abr. 409 (3)	265

I.

I'Anson *v.* I'Anson	Unreported	252
Industrie, The	5 C. Rob. 88	436

J.

Jacob Landstrom, The	4 P. D. 191	116
James *v.* Biddington	6 C. & P. 589	138
Jameson *v.* Cooke	1 Hagg. Ecc. 82	283
Jan Frederick, The	5 C. Rob. 127	387
Jeanne, The	[1917] P. 8	218, 387
Jeffers *v.* Jeffers	2 P. D. 90	243
Jekyll *v.* Jekyll	1 Lee, 419	264
John, The	2 Dods. 336	4, 83
Jones, In re	25 W. R. 303	226
—— *v.* Jones	[1896] P. 165	248
Juno, The	2 C. Rob. 116	57
——	[1916] P. 169	57

K.

Kafue, The	[1920] P. 15n.	14
Keats *v.* Keats	1 Sw. & Tr. 334	159
Kemp-Welch *v.* Kemp-Welch	[1910] P. 233	339
Keyse *v.* Keyse	11 P. D. 100	139
Kim, The	[1915] P. 215	320
——	[1920] P. 319	422

		PAGE
Kirsch & Co. *v.* Allen, Harding & Co.	[1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63; [1920] W. N. 73; 25 Com. Cas. 174	448
Kronprinz Gustav Adolf, The	2 Br. & Col. P. C. 418	203

L.

La Bellone	2 Dods. 343	291
Lancashire, The	L. R. 4 A. & E. 198	455
Learmouth *v.* Learmouth	62 L. T. 608; 59 L. J. (P.) 14	155
Lebeaupin *v.* Crispin	[1920] 2 K. B. 714	448
Lee, The	6 Asp. M. L. C. 395	114
Le France	2 C. Rob. 285n.	291
Lemann *v.* Bonsall	1 Add. 389	266
Lenders *v.* Anderson	12 Q. B. D. 50	250
Leonora, The	[1918] P. 182; [1919] A. C. 974	4
Levy *v.* Levy	[1908] P. 256	243
Limbery *v.* Mason	Comyns, 451	265
London (H.M.S.)	[1914] P. 72	15
Lord *v.* Lord	[1900] P. 297	94, 145
Louisiana, The	[1918] A. C. 461	415
Lynch *v.* Knight	9 H. L. C. 577	130

M.

Machado *v.* Fontes	[1897] 2 Q. B. 231	251
Maconachie *v.* Maconachie	[1916] P. 326	73
M'Ternan *v.* Bennett	1 F. 333	106
Manners *v.* Pearson & Son	[1898] 1 Ch. 381	448
Marburg *v.* Marburg	26 Maryland, 8	448
Maréchal Suchet, The	[1896] P. 233	115
Maria, The	4 C. Rob. 348	4, 82
Marie Gartz, The	[1920] P. 172	464
Marriott *v.* Yeoward Brothers	[1909] 2 K. B. 987	25
Martineau *v.* Kitching	L. R. 7 Q. B. 436	210
Masterman *v.* Maberly	2 Hagg. Ecc. 235	285
Mathews *v.* Warner	4 Ves. 188	266
Metcalfe, Simpson & Co. *v.* Thompson	18 Times L. R. 706	373
Mighall *v.* Sultan of Johore	[1894] 1 Q. B. 149	37
Mitchell *v.* Mitchell	2 Hagg. Ecc. 74	286
Mitchell, Cotts & Co. *v.* Steel Bros. & Co.	[1916] 2 K. B. 610	57
Morrell *v.* Morrell	1 Hagg. Ecc. 51	266
Moss *v.* Moss	[1897] P. 263	170

N.

Naples Grant	2 Dods. 273	291
Narcissus, The	4 C. Rob. 17	436
Neptunus, The	3 C. Rob. 108	218
Neutralitet, The	3 C. Rob. 295	332
Newby *v.* Newby	77 L. T. 142	135
Newsome *v.* Newsome	L. R. 2 P. & M. 306	168
Nicolas *v.* Nicolas	[1919] W. N. 267; 89 L. J. (P.) 95	313

		PAGE
Nifa, The	[1892] P. 411	372
Noel *v.* Noel	10 P. D. 179	69
Noordam (No. 2), The	[1920] A. C. 904	432
Nordstern, The	1 Acton, 128	294
Norris *v.* Norris	[1918] P. 129	17, 155
Northmoor Steamship Company *v.* Harland and Wolff	[1903] 2 I. R. 657	372

O.

Ocean Steamship Company *v.* Anderson, Tritton & Co.	13 Q. B. D. 651; 10 App. Cas. 107	26
Orozembo, The	6 C. Rob. 430	331
Oscar II., The	[1920] P. 363	432
Oster Risoer, The	4 C. Rob. 199	218
Ostsee, The	9 Moo. P. C. 150	3, 211
Otway *v.* Otway	13 P. D. 141	342

P.

Palm Branch, The	[1919] A. C. 272	352
Palmer *v.* Palmer	[1914] P. 116	339
Panaghia Rhomba, The	12 Moo. P. C. 168	331, 422
Parker *v.* London County Council	[1904] 2 K. B. 501	106
——— *v.* South Eastern Railway Company	2 C. P. D. 416	25
Parlement Belge, The	4 P. D. 129; 5 P. D. 197	30, 32
Peacock *v.* Peacock	1 Sw. & Tr. 183	159
Peggy, The	5 C. Rob. 90n.	436
Pemberton *v.* Hughes	[1899] 1 Ch. 781	258
Peterhoff, The	5 Wall, 28	218
Peters *v.* Lake	66 Ill. 206	150
Phillips *v.* Batho	[1913] 3 K. B. 25	253
Philp *v.* Squire	1 Peake, 114	130
Popple *v.* Cunison	1 Add. 377	268
Pretty *v.* Pretty	[1911] P. 83	21
Price *v.* Price	[1911] P. 201	164
Prins Frederik, The	2 Dods. 451	32
Priske *v.* Priske	4 Sw. & Tr. 238	155, 159
Purissima Conception, The	6 C. Rob. 45	82

R.

Ran, The	[1919] P. 317	322
Rayment *v.* Rayment	[1910] P. 271	242
Read *v.* Phillips	2 Phillim. 122	268
Reay *v.* Cowcher	2 Hagg. Ecc. 249	286
Rebeckah, The	1 C. Rob. 227	292, 349
Reg. *v.* Jackson	[1891] 1 Q. B. 671	133
Resolution, The	4 C. Rob. 166n.	436
Richardson *v.* Richardson	[1895] P. 276	208
Richardson, Spence & Co. *v.* Rowntree	[1894] A. C. 217	28
Rijn, The	[1917] P. 145	219
Rio de Janeiro, The	[1919] P. 242n.	62
Roberts *v.* Roberts	117 L. T. 157	160
Robertson *v.* Robertson	6 P. D. 119	339
——— *v.* ———	8 P. D. 94	311

		PAGE
Robinson *v.* Robinson	78 L. T. 391	17
——— *v.* ———	[1919] P. 352	156
Roe *v.* Naylor	[1917] 1 K. B. 712; 119 L. T. 359	26, 28
Roland, The	1 Br. & Col. P. C. 188	388
Rose *v.* Rose	8 P. D. 98	159
Russell *v.* Russell	[1892] P. 152	341
Rymes *v.* Clarkson	1 Phillim. 22	268

S.

Salisbury *v.* Gould	68 J. P. 158	106
San Onofre, The	[1917] P. 96	51
Sarah Christina, The	1 C. Rob. 237	218
Saunders *v.* Saunders	[1897] P. 89	246
Schofield *v.* Schofield	[1915] P. 207	21
Scott *v.* Bevan	2 B. & Ad. 78	448
Scrutton *v.* Childs	3 Asp. M. L. C. 373	373
Sechs Geschwistern, The	4 C. Rob. 100	396
Sexty *v.* Wells	Unreported	107
Sigurd, The	[1917] P. 250	4
Slinn, In the Goods of	15 P. D. 156	282
Smallpage *v.* Tonge	17 Q. B. D. 644	226
Smart *v.* Wolff	3 T. R. 323	53
Smith *v.* Kaye	20 Times L. R. 261	130
——— *v.* Smith	7 P. D. 84	342
Smurthwaite *v.* Hannay	[1894] A. C. 494	113
Snow *v.* Snow	2 Notes of Cases, Supp. xiii.	160
Spedding *v.* Spedding	31 L. J. (P.) 96, note 1	134
Stable, In re	[1919] P. 7	267
Statham *v.* Statham	[1912] P. 92	252
Steele *v.* Williams	22 L. J. (Ex.) 225	77
Stella del Norte, The	5 C. Rob. 349	291
Stephens *v.* Wintringham	3 Com. Cas. 169	371
Stigstad, The	[1919] A. C. 279	57, 433
Stocker *v.* Stocker	[1917] P. 264	129
Stone *v.* Stone	3 Sw. & Tr. 608	134
Strathgarry, The	[1895] P. 264	113
Stuart *v.* Stuart	*Times* Newsp., Mar. 6, 1920	343
Suart *v.* Suart	[1910] P. 246	311
Südmark, The	[1918] A. C. 475	210
Svithiod, The	[1920] A. C. 718	415
Sweeting *v.* Sweeting	36 Times L. R. 15	153
Swift *v.* Kelly	3 Knapp. 257	170

T.

Tarragona	2 Dods. 487	291
Taylor *v.* Best	14 C. B. 487	37
Teagle *v.* Teagle	1 Sw. & Tr. 188	154
Theakston *v.* Marson	4 Hagg. Ecc. 290	282
Thorold *v.* Thorold	1 Phillim. 1	285
Tomkin *v.* Tomkin	1 Sw. & Tr. 182	250
Torre *v.* Castle	1 Curt. 303	282
Tudor *v.* Tudor	4 Hagg. Ecc. 199n.	264
Tullidge *v.* Wade	3 Wils. 18	137
Turner *v.* Turner	2 Spinks, 201n.	167

		PAGE
Twee Gebroeders, The	3 C. Rob. 162	82, 358
Twee Gesuster, The	2 C. Rob. 284n.	291
Twende Brodre, The	4 C. Rob. 33	184

U.

United States, The	[1917] P. 30	431
——— *v.* Schooner Peggy	1 Cranch, 103	360
U.S. Bank *v.* Planters' Bank	9 Wheat. 904	32
Usparicha *v.* Noble	13 East, 332	178

V.

Valeria, The	[1920] P. 81	351
Van Eijck and Zoon *v.* Somerville	[1906] A. C. 489	230
Venables *v.* Venables	114 L. T. 566	152
Venus (Cargo ex)	L. R. 1 A. & E. 50	51
Vrow Anna Catherina, The	5 C. Rob. 15	85, 351
Vryheid, The	Hay & Marriott, 188	184

W.

Wakefield *v.* Mackay	1 Phil. 134n.	170
Walker *v.* Walker	1 Mer. 503	268
Wallace *v.* Wallace	74 L. T. 253	362
Walter *v.* Walter	25 Times L. R. 473	252
Ward *v.* Dey	1 Rob. E. 759	362
——— *v.* Ward	32 L. J. (P. & M.) 120	440
Wardrop, In the Estate of	[1917] P. 54	268
Watson *v.* Watson	21 Times L. R. 320	144
Weinberger *v.* Inglis	[1918] 1 Ch. 136	440
Whyte *v.* Pollok	7 App. Cas. 400	271
Wickins *v.* Wickins	[1918] P. 265	21
Willé *v.* St. John	[1910] 1 Ch. 701	208
William, The	6 C. Rob. 316	7, 211
William Hutt, The	Lush. 25	116
Willis *v.* Commissioners of Appeals in Prize Causes	5 East, 22	53
Wilson *v.* 1st Edinburgh City Royal Garrison Artillery Volunteers	7 F. 168	106
——— *v.* Wilson	L. R. 8 P. & M. 353	251
Wilton *v.* Webster	7 C. & P. 198	131
Winsmore *v.* Greenbank	Willes, 577	130
Winter *v.* Henn	4 C. & P. 494	134
Wray *v.* Wray	[1901] P. 132	251

Y.

Yglesias *v.* Yglesias	4 P. D. 71	311

Z.

Zamora, The	[1916] 2 A. C. 77	5, 89, 359
———	Lloyd's List, April 2, 1919	329

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

ADMIRALTY.

[In Prize.]

THE BERNISSE AND THE ELVE.

1919
May 14, 15;
July 25;
Oct. 15.

[1917, Nos. 1819 and 1820.]

Prize Court—Damages against the Crown—Diversion of neutral Vessels—Absence of reasonable Cause—Neutral Vessels sailing from Allied Port—Order in Council of February 16, 1917—*Practice—Stay of Execution—Security for Costs—Payment out.*

Two neutral vessels, bound from a French colonial port to Rotterdam with cargoes of ground nuts, were stopped by a British cruiser just outside the area declared by Germany to be a prohibited area in which any neutral vessel would be liable to be sunk by German submarines. The vessels had all the requisite documents of clearance from the French port, including an "acquit à caution,"—a document permitting the export of the cargo—but had not got the "green clearances" which were given to vessels which had called at a British port.

By clause 1 of an Order in Council of February 16, 1917, adopting further reprisals against the unlawful acts of Germany, "a vessel which is encountered at sea on her way to or from a port in any neutral country

1919

THE BERNISSE AND THE ELVE.

affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court." The vessels were sent in for examination to Kirkwall, and when in the submarine area one of them was sunk by a German submarine and the other was damaged. In an action against the Procurator-General for damages:—

Held, (*a*) that the Order in Council had no application to a vessel which sailed from a British or allied port; (*b*) that the absence of the "green clearance" therefore afforded no reasonable ground for sending the vessels into Kirkwall; (*c*) that as no other reasonable ground was suggested, the Crown was in the position of a wrongdoer and could not excuse itself from returning the vessels to their owners by the plea that it was unable to do so by reason of the wrongful or criminal act of the German submarines; and (*d*) that accordingly there must be a decree of restitution with costs.

Held further, that although the Crown obtained a stay of execution pending appeal, the plaintiffs were entitled to have the sums paid into Court as security for costs paid out to them.

ACTIONS tried together for damages against the Crown.

The plaintiffs were P. A. Van Es & Co., the owners, and the masters and crews of the steamships *Bernisse* and *Elve*.

The defendants were "H.M. Procurator-General or other proper officer of the Crown in its office of Admiralty," and Commander William G. Howard, R.N., Commanding Officer of H.M.S. *Patia*, and Lieut. Wilfrid E. Rogers, R.N.R.

The plaintiffs claimed costs, expenses, losses and damages occasioned by reason of the seizure of the respective vessels and their cargoes by H.M.S. *Patia* whilst, "with the licence and authority of the French Government" they were sailing from a French Port (Rufisque) to Rotterdam, and by their "unwarranted diversion from a safe channel of navigation to Kirkwall through an area which to the knowledge of the said captors was declared by Germany to form part of their blockade area to be entered into by neutral vessels at their own risk," and where the *Bernisse* was torpedoed and had to be beached and the *Elve* was torpedoed and sunk.

By their answer the defendants pleaded that the statement of claim disclosed no cause of action. They alleged that the vessels were encountered on their way to Rotterdam, "a port affording means of access to enemy territory," and that

the defendant Howard thereupon, through the defendant Rogers, ordered the vessels to proceed to Kirkwall for examination. The loss sustained by the plaintiffs was due to the action of the German submarines and not otherwise.

The circumstances under which the vessels were seized are summarised in the headnote, and are fully stated in the judgment.

May 14, 15. *Sir Erle Richards K.C.* and *Bisschop* for the plaintiffs. The vessels were bound from a French colonial port with documents which amounted to a licence from the French Government to carry their cargoes to Rotterdam; the documents should have satisfied the naval authorities and the vessels should have been allowed to proceed. They were outside the German submarine area when visited, and, even assuming there was a right of visit and search, the authorities had no right to send the vessels to Kirkwall for examination, and thus expose them to the risk of the German submarines. They were small vessels and there was a smooth sea, and they ought to have been searched at sea. On the general right of search see "Diplomatic Correspondence between the United States and Belligerent Governments relating to neutral Rights and Commerce," published in the American Journal of International Law, vol. ix., pp. 55 et seq., and vol. x., pp. 73 et seq. and 121, the result of which is that H.M. Government admitted that if visit and search at sea are possible and can be made sufficiently thoroughly to secure belligerent rights, it would be a hardship on neutral vessels to compel them to go into port. See also Oppenheim's International Law, vol. ii., p. 539.

There must be cause for suspicion before a neutral vessel can be sent into port, and if captors improperly and without reasonable cause, although through an honest mistake, seize a vessel which is not in fact open to any ground of suspicion, the captors are liable in damages and costs: *The Ostsee.*(1) It is contended by the Crown that these vessels were encountered on their way to Rotterdam, "a port affording means of

(1) (1855) 9 Moo. P. C. 150.

1919

THE BERNISSE AND THE ELVE

access to enemy territory." That is a reference to the Retaliatory Order in Council of February 16, 1917, but that Order cannot apply to these vessels as they left an allied port and therefore were under no obligation to call at a British port in the course of their voyage. The seizures were wrongful, and therefore the Crown is liable to the plaintiffs for the loss of the *Elve* and the damage to the *Bernisse*.

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *Bruce Thomas* for the defendants. The "acquit à caution" was merely a Custom-house document, and the plaintiffs' evidence merely establishes that if stopped by a French cruiser the vessels "probably" would have been allowed to proceed. It was impossible, having regard to the German submarine peril, to examine any vessel, however small, at sea, and the naval authorities were bound to send all vessels into port for search. In fact, these vessels were "bound to a country which afforded access to enemy territory," and on the wording of the Order in Council it is at any rate an arguable question whether the Order did not apply, although the vessels were bound from an allied port. But it is unnecessary to argue the question—the meaning and scope of the Order were fully argued in *The Leonora* (1)—for even if the Order be held not to apply, damages would not be imposed upon the Crown as a consequence of the mistaken construction of the Order: *The Sigurd.* (2) In *The Ostsee* (3) there was no possible right to detain the vessel as no blockade existed until some three weeks after the capture. That case, therefore, has no application to the present circumstances. Unless the possession is tortious and unjustifiable the captors are not responsible: *The Betsey* (4); see also *The Maria* (5) and *The John.* (6) Even assuming the seizure and ordering into port were unjustified, they were not tortious acts, and the captors are not responsible for the consequence of the illegal acts of the Germans in committing acts of piracy contrary to all the principles of civilized warfare.

(1) [1918] P. 182; [1919] A.C. 974.
(2) [1917] P. 250.
(3) (1855) 9 Moo. P. C. 150.
(4) (1798) 1 C. Rob. 93.
(5) (1803) 4 C. Rob. 348.
(6) (1818) 2 Dods. 336.

1919

THE BERNISSE AND THE ELVE.

[THE PRESIDENT. If you take possession of a neutral vessel without any reasonable cause you are in no better position than that of a wrongful bailee of goods, and it is no answer to the owner of the goods to say that somebody else by a wrongful act has destroyed them.]

The Crown was rightly in possession. There was clearly a right of visit and search, and the sending into Kirkwall was merely ancillary to and a prolongation of that right. See *The Zamora*. (1) It was in no sense a capture or seizure as prize. An officer should not be deprived of the benefit of his bona fides if in the course of exercising the right of visit and search he erroneously takes the view that further investigation is necessary. Further, in order to impose responsibility for the loss caused by the illegal acts of the Germans, it must be established that in sending the vessels into Kirkwall they were thereby exposed to greater risk. There is no evidence of that ; the risk in searching them at sea would have been as great or greater, and they were equally exposed to submarine attack had they continued on their voyage to Rotterdam.

Sir Erle Richards K.C. replied.

Cur. adv. vult.

July 25. The PRESIDENT (LORD STERNDALE). In this case a claim was made on behalf of the owners of the steamships *Bernisse* and *Elve* for damages against the Crown arising from damage to the *Bernisse* and the loss of the *Elve*, and the question which arises lies in a narrow compass but is not easy to decide. It is whether in the circumstances the Crown, acting by the Admiral in Command of the Cruiser Patrol at the place where the vessels were stopped, had reasonable cause for detaining them and sending them into Kirkwall.

The facts, so far as it is necessary to state them, are as follows : The two vessels were small steamers of about 950 tons gross, owned by P. A. Van Es & Co., and at the time were under charter to a firm called the N. V. O. Cie Fabriken Calve to carry a cargo of ground nuts from Rufisque, a port in the French colony of Senegal, to Rotterdam. The cargo

(1) [1916] 2 A. C. 77.

1919

THE BERNISSE AND THE ELVE.

The President.

was consigned to the N.O.T. and was shipped at Rufisque by a company called the Nouvelle Société Commerciale Africaine. This company had obtained permission to export the nuts from the Governor-General of French West Africa, and the requisite documents of clearance, which will be more particularly described later, were obtained for the shipments. The two vessels made their voyages under the charter in company, and the facts as stated apply to both of them.

This was the second voyage made by them to the port of Rufisque for a cargo of ground nuts. On the former they went by the southern route, i.e., through the English Channel, and were visited, but not searched, on the outward voyage. They loaded a similar cargo and left Rufisque on February 14. They obtained the following documents: The déclaration de simple exportation, the manifeste de sorties, and what is called the acquit à caution. This is a document permitting the export of cargo on security being given by the shippers, guaranteed by a substantial firm of merchants that the cargo shall be delivered at the Port of Rotterdam within three months. On the homeward voyage the vessels were visited in the Downs and the ships' papers examined. After an interval of several days, which I was informed was increased by some misunderstanding as to the return of the papers, they were allowed to proceed and arrived in Rotterdam and discharged their cargo. As I understand the evidence the cargo was kept under the supervision of the Customs until it was certain that it was being used only for the purpose of being converted into oil in Holland, and was not being exported. On April 4, 1917, the vessels left Rotterdam in ballast on the second voyage, and on this occasion they took the northward route by the north of Scotland. They were visited by British cruisers on April 11 and 13, but were allowed to proceed, and arrived at Rufisque on April 25, 1917. There they again loaded a cargo of ground nuts, and left for Rotterdam on May 2, 1917, carrying the same papers as on the former voyage. It was not disputed that these papers were in order for a vessel leaving the port of Rufisque. The vessels again took the northward route, and on May 20 were stopped by H.M.S.

1919

THE BERNISSE AND THE ELVE.

The President.

Patia and boarded by an officer from her. They were stopped in Lat. 62°4 N. and Long. 15°10 W., which is just outside the area declared by the Germans to be prohibited, and one in which any vessel was liable to be torpedoed and destroyed by submarines. After examination of their papers and some communication between the boarding party and the cruiser, and the cruiser and the Admiral, they were ordered into Kirkwall. The masters protested, because their course to Kirkwall would take them through the prohibited area and expose them to danger from submarines, but they were told that they must go, and that a wireless message had been sent into Kirkwall for an escort. They therefore proceeded, each having a British officer and some men on board who took charge of the ship, and on May 23 they were attacked by a German submarine, which torpedoed both vessels, with the result that the *Elve* sank and the *Bernisse* was badly damaged, but succeeded in continuing her voyage to Kirkwall. There she was temporarily repaired and eventually reached Rotterdam. It was stated that the submarine fired on the crew as they were getting into, and while in, the boats, but no lives were lost. It was for this loss and damage that this claim was made, and the liability of the Crown seems to me to depend upon whether there was reasonable ground for detaining the vessels and sending them into Kirkwall. It was argued on behalf of the Crown that there was no liability unless the result of the order was to expose the vessels to greater danger than they would have incurred if not sent into Kirkwall, and that the danger from submarines was just as great on the ordinary course to Rotterdam as on that to Kirkwall. I do not think that this argument is well founded. If the Crown had no reasonable grounds for taking possession of the vessels and diverting them from their course it is a wrongdoer, and cannot excuse itself from returning the property to the rightful owners by saying that it cannot do so by reason of the wrongful or even criminal act of a third person. (See *The William* (1) and Pratt's Story, p. 39.) But if it be necessary

(1) (1806) 6 C. Rob. 316.

1919

THE BERNISSE AND THE ELVE.

The President.

to determine the question, I have no hesitation in finding that although there was danger from submarines outside the prohibited area, it was much greater within, and that therefore, by reason of the action of the Crown the vessels were exposed to greater danger.

It is therefore necessary to consider whether there was any reasonable cause for putting the vessels in charge of a British officer and crew, and taking them into Kirkwall. In my opinion this depends upon the question whether in the circumstances the absence of what is called a green clearance formed such a justification. Wider questions were argued during the case involving the whole question of the rights of a belligerent to send a vessel into port for examination instead of examining her at sea, as was the practice in former times. I do not think this case raises that question, for I am satisfied upon the evidence that the officer who stopped the vessels was satisfied that there was nothing connected with the papers, or the cargoes of the vessels, which required further search to be made, and that no one considered that there was any reasonable ground for detaining the vessels any longer, or sending them in for examination, except the absence of the so-called green clearance. I shall deal with the evidence on this point later. A green clearance is a card so called from its colour employed during the war to show that the vessel to which it is given has been cleared either from a British port of departure or a British port of call, and derives its importance in this case from the provisions of an Order in Council of February 16, 1917, which recites what is declared to be the improper and unlawful action of Germany and the necessity for further reprisals than had been taken before, and then proceeds: "A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court." The green clearance shows that a vessel has either come from

1919

THE BERNISSE AND THE ELVE.

The President.

or has called at a British port, but it is to be observed that a vessel which has called at an allied port has complied with the conditions of the Order just as much as one which has called at a British port, and yet such vessel will not have a green clearance, but some clearance corresponding to it according to the law of the allied nation to which the port belongs.

The facts so far as it is necessary to state them are as follows. When the vessels were stopped a lieutenant, R.N.R., was sent from the British cruiser, and boarded the vessels. He examined the papers, and it is not disputed that so far as they went they were in order, but there was no green clearance. Amongst them was the document previously mentioned, called an acquit à caution, which has been translated as an acknowledgment subject to security. It is not a very legible document, but no objection was taken to it on that ground, and there was no suggestion that the officer did not read it and understand it. In effect it was a clearance of the goods, and a permit to export them subject to an undertaking by the shippers, guaranteed by a substantial firm of merchants as to the destination of the goods. It also contained a statement that an authority to export the cargo of nuts had been obtained from the Governor-General. By the bills of lading the goods were consigned to the N.O.T., and the papers showed a shipment at, and a voyage from, a French colonial, and therefore an allied port, with all the regular clearances, and papers, necessary in the circumstances. Acting on instructions, the lieutenant asked if the master had a green clearance, and was told he had not, and he reported the whole facts to the commander of the cruiser. The commander of the cruiser thought the case was an exceptional one, and, therefore, communicated with the Admiral to know what he was to do, giving to the Admiral all the information which he himself had, and received in answer an order directing him to send the vessels into Kirkwall. An armed party was then put on board and they proceeded on the voyage to Kirkwall. The evidence of the commander of the cruiser is, in my opinion, so important on the question of the reasons for sending the vessels to Kirkwall

1919

THE BERNISSE AND THE ELVE.

The President.

that I propose to give it in some detail. [His Lordship read the evidence and continued:] This evidence in my opinion shows clearly that the vessels were not sent in for search in the ordinary sense of the word, and that the officers concerned were of opinion that there was no reason for detaining them, or sending them in, except the absence of a green clearance. It also shows in my opinion that in sending them in the officer concerned did so in execution of the powers of the Order in Council of February, 1917, and for no other reason, and, therefore, I think the issue in the case is narrowed to the question whether there was reasonable ground for thinking that the provisions of the Order in Council applied to this case.

I have already pointed out that a vessel might strictly comply with the conditions of the Order by calling at an allied port and still have no green clearance, but it seems to me clear that the Order has no application to a vessel which leaves a British or allied port and that such a vessel is not obliged to call at another British or allied port in order to escape the presumption raised by the Order in Council, and the consequent sending in for examination, and possible adjudication. I am, therefore, of opinion that the absence of a green clearance afforded no reasonable ground for sending these vessels to Kirkwall, and as no other reasonable ground was suggested, I think there must be a decree of restitution with costs. I do not think there is any ambiguity or difficulty in the terms of the Order in Council, and that it clearly did not apply to this case.

My judgment is based entirely upon the conclusion I draw from the evidence in this particular case that the vessels were not sent in for search in the ordinary way, that the officers were satisfied that there was no ground for so sending them in, and that the sole cause for so doing was that they were considered to come within the provisions of an Order in Council which had no application to the case. It has no relation to the general question of the right to search a vessel in port instead of at sea.

Leave to admit an appeal.

1919

THE BERNISSE AND THE ELVE.

Oct. 15. *Bisschop* applied that two sums of 300*l.* paid into Court as security for costs in the respective actions should be paid out to the plaintiffs.

Bruce Thomas for the Procurator-General opposed the application and also asked for a stay of execution pending the appeal.

THE PRESIDENT granted a stay and said that he would consider the question of the security.

After the midday adjournment :—

THE PRESIDENT (LORD STERNDALE) said : This was a case in which foreign shipowners were plaintiffs in a claim against the Crown, and they succeeded. They had given security for costs in the ordinary way. They now ask that that security should be paid out to them, and the Crown ask, on the other hand, that it may be retained in Court, because the Crown have got a stay of execution. The effect, however, of ordering that money to remain in Court would be to give them one or other of two things—either security for the costs of their own appeal, or security for the satisfaction of the judgment which may be given on appeal, and they are not entitled to either. Therefore, I shall make an order for payment out to the claimants of the money paid in as security.

Solicitors for the plaintiffs : *Ince, Colt, Ince & Roscoe.*
Solicitor for the defendants : *The Treasury Solicitor.*

E. C. T.

1919
October 20.

[ADMIRALTY.]

THE VERASTON.

[1918, fol. 125.]

Admiralty—Collision—Damages—Demurrage—Delay due to waiting for Convoy —Remoteness of Damage.

On January 13, 1918, the plaintiffs' steamship *A.* was damaged in a collision with the steamship *V.*, whose owners admitted liability, and the damages were referred to the Registrar for assessment. But for the repairs rendered necessary by the collision the *A.* would have sailed in convoy on January 15. The next convoy with which the *A.* was able to sail did not leave until January 31. The actual repairs to the *A.* occupied only four days :—

Held, that the delay flowed directly from the collision, that the damage thereby suffered by the plaintiffs was not too remote, and that accordingly the plaintiffs were entitled to sixteen days' demurrage.

Motion in objection to the Registrar's report on a reference to assess damages in an action of damage by collision.

The plaintiffs were the Lords Commissioners of the Admiralty; the defendants were the owners of the steamship *Veraston*.

On January 13, 1918, the *Veraston* came into collision with the steamship *Antenor*, under requisition to the plaintiffs. The defendants admitted liability for the collision, subject to a reference to the Registrar to assess the damages. The repairs to the *Antenor*, rendered necessary by the collision, only occupied four days, but the plaintiffs claimed sixteen days' demurrage, amounting to 721*l.*, which the learned Registrar allowed in full on the ground that the *Antenor*, owing to the collision, was unable to sail in the convoy which left on January 15 and had to wait until January 31 before another convoy sailed. The defendants appealed.

Balloch for the defendants.

C. R. Dunlop K.C. for the plaintiffs.

[The arguments and the cases cited are set out in the judgment.]

1919

THE VERASTON.

HILL J. This is a motion in objection to the Registrar's report in respect of one item in a claim by the Admiralty arising out of a collision between the steamship *Antenor* and the steamship *Veraston*. The item in dispute is that of demurrage, and in respect of that the Registrar has allowed sixteen days. The contention is that he ought to have allowed only four days.

The collision happened on January 13, 1918, and it is agreed that the actual repairs took four days to complete. If there had been nothing else, therefore, the ship would have been free to sail on January 17. Since October, 1917, it was usual for ships to sail in convoy. The *Antenor*, being a fast-going east-bound ship, would, in the ordinary course of things, have sailed in the fast-going east-bound convoy, which went via the Mediterranean. It is not disputed that it was reasonable for her, if she missed the one fast-going east-bound convoy, to wait for the next. Though there were other convoys sailing, they went by other routes, and would probably have involved a greater loss of time. The convoys in January, 1918, were to sail on January 15 and 31. The *Antenor* would, in the ordinary course, have joined the convoy of January 15. By reason of the collision, she was prevented from joining that convoy, and the consequence was that she had to wait for the next convoy, which left on January 31. The Registrar has treated that loss of time as flowing from the collision, and as not being a too remote consequence of the collision.

The defendants argue that the delay caused by waiting for a convoy was not such a consequence of the collision as can be allowed to be taken into account in considering the damages claimed from them for the collision. Upon the facts as found, which indeed are not in dispute, in my opinion, so far as it is a question of law, the Registrar was right. First, it is quite clear that the test in all cases is not that which Mr. Balloch submitted—namely, when was the ship put at the disposal of her owners again? As a general proposition that is stated too widely, and it is inconsistent with the judgment of Bowen L.J. in *The Argentino* (1), where he said : "Upon the other

(1) (1888) 13 P. D. 191, 202.

1919

THE VERASTON.

Hill J.

hand the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone." That leaves in each case the question to be considered—Did the loss which is claimed as flowing from the collision flow directly from it in the usual course of things? By the usual course of things I take it is meant the course of things as they usually were at the time of the wrongdoing. At the time of the wrongdoing it was usual, and indeed necessary, for ships to sail in convoy, and it was usual for a ship like the *Antenor* to sail in the fast-going east-bound convoy. Did the delay flow directly from collision? It seems to me that it flowed immediately from the collision. It was the repairs, necessitated by the collision, which caused her to miss sailing on January 15; it was missing that sailing that caused her to sail on January 31. Did it flow from the state of things as they then existed? It clearly did in my opinion.

It is said that my judgments in *The Charles Le Borgne* (1) and *The Kafue* (2) show that the Registrar was wrong and that I am wrong in what I am now saying. In my view those cases have no bearing upon the present case at all. In each of those cases there was a separate and independent act of a Government intervening quite unconnected with the collision which caused delay of the ship—additional delay which would have taken place if the collision repairs had not had to be done.

It was also suggested by Mr. Balloch that this further period ought not to be allowed because it did not follow that if the *Antenor* had sailed in the convoy of January 15 she would have arrived sixteen days earlier than she did sailing on January 31—that all sorts of things might have happened on that voyage to delay her. But in the first place, at the reference, as far as I can understand, and I think to-day, the controversy has been not as to whether some allowance should be made off the sixteen days, having regard to chances, but whether four days was

(1) Note 1, post, p. 15. (2) Note 2, post, p. 15.

the proper time or the whole period was the proper time to be considered. And in any case I have no reason to suppose that the Registrar has not taken into account the question of these elements of chance discounting the full allowance which I think should otherwise be made.

I therefore think that the view of the Registrar was right. The motion will be dismissed with costs and the report of the Registrar affirmed.

Solicitor for the plaintiffs : *The Treasury Solicitor.*

Solicitors for the defendants : *Botterell & Roche,* for *Weightman, Pedder & Co., Liverpool.*

NOTE 1. THE CHARLES LE BORGNE.—This was a motion in objection to the report of the Registrar on a reference to assess the damages sustained by the defendants, the owners of the steamship *Charles le Borgne* in a collision with the plaintiff's steamship *Taikosan Maru,* which took place on February 28, 1917, and for which the *Taikosan Maru* was held alone to blame.

HILL J., in giving judgment on November 25, 1918, said that *The Charles le Borgne* put into Brest for repairs. The collision repairs took ten days, and while these repairs were going on, a wireless installation was fitted on the ship in accordance with the orders of the French Government. This work occupied three days longer than the collision repairs, and the question was whether the defendants, as a result of the collision, lost the use of the ship for three days more. The Registrar, on the authority of *H.M.S. London* (1), decided that they had. "In my view," said his Lordship, "*The London* gives no assistance in this case. In that case, while the *London* was being repaired there was a strike which made the repairs last longer, and the loss of time was directly connected with the collision. In this case it is not 'in the ordinary or usual or natural course of things' that the ship which went into port for repairs should be compelled by the Government authority to insert a wireless installation; and so far from it being a consequence of the collision it was a consequence of a quite independent order of the French Government. It seems to me to be no more a consequence of the collision than if the owner himself had taken the opportunity of fitting the wireless installation. The item in question must therefore be deducted from the allowance for detention."

NOTE 2. THE KAFUE.—This was a motion in objection to the Registrar's report on a reference to assess the damages to the plaintiff's barque *Dieppedalle* occasioned to her in a collision with the defendant's steamship *Kafue.*

HILL J. in giving judgment on February 18, 1919, said that one of the objections raised by the defendants was in respect of loss of time allowed by the Registrar for the period occupied in fixing a gun and wireless apparatus. The collision was on November 20, 1916. The collision repairs were completed on May 3, 1917. The ship did not sail until July 12. Substantially

(1) [1914] P. 72.

1919

THE VERASTON.

the delay from May 3 to July 12 was due to the fact that by order of the French Government the *Dieppedalle* had to be fitted with a gun platform, supplied with a gun and gunners, and also fitted with a wireless apparatus. He had already decided a similar point in *The Charles le Borgne* (supra). The only difference between the two cases was that in *The Charles le Borgne* the order of the Government was in existence at the date of the collision, and in the present case it came into existence afterwards. In his Lordship's view that difference was immaterial, and the case must be referred back to the Registrar to adjust the figures accordingly.

E. C. T

[DIVORCE.]

BURNE *v.* BURNE AND HELVOET.

1919
Nov. 21.

Divorce—Practice—Costs against Co-respondent—Damages—Knowledge that Respondent is married—Circumstances Material for Assessment of Damages.

There is no absolute rule of practice that a co-respondent cannot be condemned in costs unless at the time of the first misconduct he knew that the respondent was a married woman. Costs are always in the discretion of the Court.

Semble, though on the assessment of damages evidence as to the means of the co-respondent cannot be received, yet the general position and obligations of the parties are material for consideration in order that an assessment may be arrived at which the co-respondent can discharge, and which will not defeat its object, but bring a sum into Court to be dealt with.

Robinson v. *Robinson and Wilson* (1898) 78 L. T. 391 and *Norris* v. *Norris and Smith* [1918] P. 129 approved and followed.

This was a husband's petition for divorce on the ground of his wife's adultery with the co-respondent.

The petition alleged adultery with the co-respondent generally, adultery resulting in the birth of a child on May 23, 1918, and subsequent adultery in and between the months of April, 1918, and January, 1919, and claimed 200*l.* damages or such sum as might be assessed. There was one child of the marriage.

The respondent did not appear.

The co-respondent admitted the adultery resulting in the birth of the child, but denied the other charges, and alleged that at the time of the admitted adultery he did not know that the respondent was a married woman, and pleaded condonation by cohabitation in October, 1918.

In his reply the petitioner joined issue as to the further adultery and ignorance that his wife was married. As to condonation he admitted that he had forgiven his wife on March 7, 1918, on her promise not to err again ; and admitted cohabitation in October, 1918, on his return from military duties in France, but said he was then ignorant of any misconduct after March 7, 1918; and when he discovered it he had separated from his wife and there had been no further cohabitation or condonation.

The evidence established that adultery had been committed

1919

BURNE v. BURNE AND HELVOET.

by the respondent and co-respondent after March, 1918, during the petitioner's absence at the war; and that during the earlier adultery the respondent had passed as a single woman and worn no wedding ring; but when she became pregnant, as the result of her intercourse with the co-respondent, and he offered her marriage, she told him she was the wife of another man. In March, 1918, an interview took place between the petitioner, the respondent and the co-respondent, after which the petitioner forgave the respondent on her promise to have no further relations with the co-respondent. From that date there could be no doubt that the co-respondent knew that the respondent was the petitioner's wife.

Van den Berg, for the petitioner, tendered evidence of the co-respondent's means, but it was rejected.

Cotes-Preedy for the co-respondent. Adultery is admitted, but the co-respondent ought not to be ordered to pay costs, for at the time the intercourse commenced he did not know that the respondent was married: *Bilby* v. *Bilby and Harrop*. (1) And the damages should be light.

[*Skinner* (amicus curiæ) referred to *Norris* v. *Norris and Smith*. (2)]

THE PRESIDENT (SIR HENRY DUKE). The important question arising in this case is with reference to what happened from the spring of 1918 to the month of October of the same year. The evidence is that the respondent and co-respondent continued during this period to live in adjacent flats, and that communication between them did not cease, but, on the contrary, that they openly cohabited and lived in adultery. I have to decide first whether the co-respondent is relieved from his liability to pay costs; and, secondly, whether this is a case for damages, and, if so, what amount I should assess. It is suggested that the practice is that when at the time of the adulterous intimacy springing up he has no knowledge of the woman being married, that circumstance ipso facto absolves her paramour from all liability for costs. In my judgment there is no such rule, and costs remain in the

(1) [1902] P. 8. (2) [1918] P. 129.

1919

BURNE v. BURNE AND HELVOET.

The President.

discretion of the Court. That is laid down by Lord Gorell in *Robinson* v. *Robinson and Wilson* (1) and by Hill J. in *Norris* v. *Norris and Smith* (2), and I do not find anything in *Bilby* v. *Bilby and Harrop* (3) to weigh against the expressed view of those two judges, with which I entirely concur.

I, therefore, propose to act upon that view and to exercise my discretion on the question of costs arising in this case. In my opinion it is a bad case and discreditable to the co-respondent, though I do not say that there may not be some mitigating circumstances. I, therefore, decree that the co-respondent be condemned in the costs.

There remains the question of damages. On this part of the case it is in my view material that the adulterous intercourse went on long after it had been confessed and forgiven. It may have been easy for the co-respondent to blind the husband at that juncture by telling him that he (the co-respondent) did not know that the woman was married; but even if I act on the view that that statement was true, the co-respondent committed adultery with full knowledge of the facts after March, 1918; and I must assess the loss he occasioned to the petitioner in the light of the evidence available. It is clear that I must not receive evidence of particular means or profits of the co-respondent; but commonsense tells me that I must bear in mind the general position and obligations of the parties and make an award which it will be possible for the co-respondent to meet and which will not defeat its own object, but bring a sum of money from the co-respondent to be dealt with by the Court.

[The President then dealt with the position of the parties and the loss sustained by the husband, and awarded 600*l.* damages, and, this sum exceeding the amount claimed by the petitioner, gave counsel for the petitioner, on his application, leave to make any necessary amendment.]

Solicitor for petitioner: *T. E. Preston.*

Solicitors for co-respondent: *Sidney Smith, Son & Leefe.*

(1) 78 L. T. 391. (2) [1918] P. 129.

(3) [1902] P. 8.

J. R. B.

[DIVORCE.]

1919
Nov. 21.

WILSON *v.* WILSON.

Divorce—Adultery of Petitioner—Discretion of Court—Principles on which Discretion will be exercised—Interests of all Persons concerned, including Children of the Marriage—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

The discretion given to the Court by the Matrimonial Causes Act, 1857, s. 31, to grant relief to a petitioner who has been guilty of misconduct is not to be exercised readily but with stringency. When the guilty petitioner is the husband, and the Court is convinced of his bona fides, the following facts may be taken into consideration: (1.) the position and interests of his children; (2.) the interest of the woman with whom he has misconducted himself, that she may be in a position to marry him; (3.) the fact that the withholding of a decree will not be likely to reconcile husband and wife; and (4.) the interest of the husband himself that he may remarry and lead a respectable life.

THE parties were married in 1909, and there were three children of the marriage.

The husband joined the army early in the war, and during his absence on military service in France his wife committed adultery with a man unknown. The petitioner returned from the war in June, 1917, and finding his children were in a neglected condition, took them from the care of his wife. Amelia Brown, an old friend of his family, and a respectable woman, took charge of his children. The petitioner having obtained evidence of his wife's misconduct brought his petition, and on October 18, 1918, obtained a decree nisi. He failed to disclose at the hearing the fact that, after he had discovered his wife's misconduct, he had himself committed adultery with Amelia Brown, and a child had been born before the decree nisi. After that decree Amelia Brown continued to live with the petitioner as his wife and took care of his children. The petitioner desired to marry her.

The King's Proctor intervened.

Rawlinson K.C. (*Harold Smith* with him) for the King's Proctor. There are no circumstances in this case to justify

the Court in exercising the discretion. It must be exercised with very great strictness: *Hines* v. *Hines and Burdett.* (1)

J. A. C. Skinner for the petitioner. The discretion of the Court is absolute and unfettered: *Wickins* v. *Wickins* (2); *Holland* v. *Holland.* (3) The Court will consider all the surrounding circumstances, including the conduct of the respondent, which may have contributed to bring about the adultery and the interest of the woman with whom the petitioner has committed adultery and her child: *Pretty* v. *Pretty* (4); *Schofield* v. *Schofield* (5); *Hook* v. *Hook and Brown.* (6)

THE PRESIDENT (SIR HENRY DUKE), after stating the facts, continued: The petitioner is not in my judgment a profligate, but desires to live a respectable life and to do his best for his children. I accept his statement as to the information he received and as to his own observation in June, 1917, as to the effect upon the children of the way in which his wife had treated them. There was also evidence tending to show that at an earlier period they had been well cared for, but the wife's conduct as a mother is quite likely to have deteriorated when she came under the influence of a paramour. I think that the petitioner in taking the children away from their mother acted honestly and in their interest, and it must be remembered that the state of facts which resulted in his misconduct arose originally from that proceeding. I do not believe that he intended to deceive the Court, and whilst I recognize the deliberate character of his action, I must also remember the unfortunate position in which he was placed.

I have come to the conclusion that on the whole there are in this case circumstances which warrant the exercise of the judicial discretion in his favour. These are (1.) the position of the children to whose interest it is that they should have a home with the sanctions of decency and, so far as may be, of the law; (2.) the position of Amelia Brown, for it is clearly in her interest that she should be lawfully married; (3.) the case of the respondent, who long ceased to have any relations

(1) [1918] P. 364.
(2) [1918] P. 265.
(3) [1918] P. 273.
(4) [1911] P. 83.
(5) [1915] P. 207.
(6) [1917] P. 56.

1919

WILSON v. WILSON.

The President.

with the petitioner, and as to whom there is no prospect that my refusal of relief would have the effect of reconciling her to her husband; and, (4.) the case of the petitioner; it is in his interest that he should be able to marry and live respectably. This discretion is not to be exercised eagerly or indeed readily, but with some degree of stringency. In the present case however I think that the circumstances which I have indicated do justify me in exercising it, and I, therefore, whilst allowing with costs the intervention of the King's Proctor, which was justified, do not rescind the decree nisi.

Solicitors: *The King's Proctor; Peet & Manduell.*

J. R. B.

[ADMIRALTY.]

1919

Nov. 26, 27; *Dec.* 2.

THE LUNA.

[1919, fol. 213.]

Admiralty—Collision—Tug and Tow—Contract of Indemnity.—Foreign Master.—Ignorance of Terms of the Contract.—Authority to bind Owners.

The master of the Dutch fishing vessel *L.*, who spoke very little English and could not read English at all, engaged the tug *K.* to tow his vessel from the mouth of the Humber to dock and from dock to sea for 15*l.* He verbally agreed the terms with one of the partners of the firm owning the *K.* who wrote them down on a debit note form and the master signed it. The form contained a printed clause of conditions of towage under which the owners of vessels towed undertook to indemnify the tug owners against all liability whatsoever and against all costs and charges in respect of any actions that might be brought against the tug owners in relation to loss or damage to (inter alia) any other ship through collision or otherwise. The master, though he knew he was signing a contract, was not aware that the printed conditions contained an indemnity clause. In the course of the towage the *K.* towed the *L.* into the *F. and J.*, a vessel at anchor, whose owners sued both the *K.* and the *L.*, and the *K.* was held alone to blame. In third party proceedings by the owners of the *K.* against the owners of the *L.* for an indemnity:—

Held, that the master of the *L.* was bound by the conditions of towage and had authority to bind his owners, and that accordingly the owners of the *K.* were entitled to be indemnified by the owners of the *L.* against

the damages assessed against the *K.* in the collision action, and the costs payable to the owners of the *F. and J.* in that action, and also against the *K.'s* own costs in that action.

1919

THE LUNA.

THIRD PARTY proceedings for an indemnity in an action of damage by collision.

The plaintiffs in the collision action were the owners of the sailing vessel *Frances and Jane;* the defendants were the owners of the sailing vessel *Luna* and the owners of the steamtug *Kingston.*

The collision took place on January 26, 1919, in the Prince's Dock, Hull, between the *Luna,* a wooden lugger of 86 tons register, and the *Frances and Jane,* a wooden barquentine of 193 tons register, which was at anchor. The *Luna,* together with another lugger, the *Alida,* was in tow of the steamtug *Kingston,* the *Alida* being made fast astern of the *Luna.*

By a third party notice, the defendants, the owners of the *Kingston,* claimed to be indemnified by the owners of the *Luna* against any sum which the plaintiffs might recover against the owners of the *Kingston* for damages and costs, and against the costs incurred by the owners of the *Kingston* in defending that action, and against the costs of and incidental to the third party notice and proceedings, on the ground that the towage of the *Luna* by the *Kingston* was being performed on the following terms: "That on the hiring or employment of the steamtug the master and crew thereof shall be held to become the servants of and identified with the vessel or craft being towed, and under the control of the person in charge of such vessel or craft during the performance of the contract. The steamtug owners are not responsible for the acts, neglect or default of the master, pilots or crews of the steamtugs, or other persons in their employment . . . . or for any damage or loss that may arise to such vessel or craft being towed or about to be towed or having been towed or cargo on board same, or any other ship or cargo, or any pier, wharf or other property through collision or otherwise . . . . however occasioned . . . . and the owners or persons interested in the vessels or

1919

THE LUNA.

craft so being towed or about to be towed or having been towed or the cargo on board of the same shall and do undertake to bear, satisfy and indemnify the steamtug owners against all liability whatsoever and against all costs and charges in respect of any law expenses or actions that may arise or be brought against the said tug owners in relation to any such loss or damage actual or alleged."

The defendants, the owners of the *Luna*, denied that the towage was being performed under the terms set out in the third party notice and alleged that the towage was performed under the ordinary common law liability of the owners of the *Kingston*, whose crew had the sole control of the navigation, to tow the *Luna* safely to her destination and without causing her to come into collision and do damage.

The facts as found by the learned judge on the question of the towage contract were as follows: "The *Luna* was boarded by a Mr. Thompson, one of the partners of the firm which owned the *Kingston*, and he and the master, who was a Dutchman, agreed that the tug should tow the *Luna* from river to dock and from dock to sea, and agreed the price, 15*l*. Mr. Thompson wrote these terms out on the document in question, which was in the form of a debit note with the clause in question printed on it, and placed the document before the master. The master understood very little spoken English, and could speak English very little, and could not read English at all. He had spent most of his time in fishing and this was his first visit to England, except as a boy. The *Luna* was a fishing lugger which had been adapted for cargo and was a sort of vessel new to the Home Trade. The master saw there was print upon the document but did not attempt to read it and did not ask any questions about it. Mr. Thompson said nothing about it. The master signed the document. Each intended the document to contain the contract for towage. Mr. Thompson intended the whole document to be the contract. The master said he would not have signed it if he had known what the clause provided, and that he asked no questions because he believed Mr. Thompson would not do anything unjust."

1919

THE LUNA.

The collision action came before Hill J. and two of the Elder Brethren of the Trinity House on October 16 and 17, 1919, and on November 24 the learned judge delivered a judgment in which he held the *Kingston* alone to blame for the collision and gave judgment for the plaintiffs, the owners of the *Frances and Jane*, against the owners of the *Kingston* with costs, and adjourned the third party proceedings for further argument.

Nov. 26, 27. *J. Ellis Cunliffe* for the owners of the *Frances and Jane*.

Dunlop K.C. and *Dumas* for the owners of the *Kingston*. In the absence of fraud, where a person signs an agreement he is bound by it whether he read or understood it or not: *Parker* v. *South Eastern Ry. Co.* (1); see also *Harris* v. *Great Western Ry. Co.* (2) The towage was performed on the faith of the master's signature and he cannot adopt part only of the document: *Burke* v. *South Eastern Ry. Co.* (3) The numerous railway ticket cases stand on a different footing. The ticket may only be a receipt and the question in each case is whether the plaintiff agreed to the conditions. In the present case it is agreed that the document constituted a contract which the master of the *Luna* signed. [Reference was also made to *Marriott* v. *Yeoward Brothers* (4), and *Cooke* v. *Wilson, Sons & Co.* (5)]

E. Aylmer Digby (*Stephens K.C.* and *A. E. Nelson* with him) for the owners of the *Luna*. If the master of the *Luna* knew of the conditions of towage, or reasonable steps were taken to acquaint him of the conditions, no doubt he would be bound by them, but what might be reasonable steps in the case of an English master are not reasonable steps when dealing with a foreigner with little or no knowledge of English; the class of person with whom the contract is made must be taken into account: see the judgment of Pickford L.J. in *Marriott* v. *Yeoward Brothers* (4) The master did not think the printed clause had anything to do with the contract. The

(1) (1877) 2 C. P. D. 416.
(2) (1876) 1 Q. B. D. 515, 530.
(3) (1879) 5 C. P. D. 1.
(4) [1909] 2 K. B. 987.
(5) (1915) 85 L. J. (K. B.) 888.

1919

THE LUNA.

dictum in *Parker* v. *South Eastern Ry. Co.* (1), that a person who signs an agreement is bound by it whether he has read it or understands it or not, is qualified by the words "in an ordinary case." Clearly it would not apply in the case of an infant; the master was in a similar category, he was not in a position to understand the contract and thought he was merely signing a document making himself liable to pay 15*l.* for a towage to dock and from dock to sea. If the contract contains terms to which the master never assented he can rely on the oral agreement: *Roe* v. *Naylor*. (2) The master had no authority to bind his owners by a contract of this sort, he "cannot bind his owners by every towage contract which he may think fit to make": see per Brett M.R. in *Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (3) The contract must be reasonable, and to assume liability for the torts of persons over whom the person liable has no control is on the face of it an unreasonable agreement. Further, the contract must be read reasonably. In the present case the vessels of two different owners were being towed under this alleged contract of indemnity, and the owners of the *Kingston* might equally well have proceeded against the owners of the other vessel and endeavoured to make them responsible for the damages and costs. The contract of indemnity therefore can only be applicable where all the vessels in tow belong to the same owners.

Dunlop K.C. in reply. The master of the *Luna* would undoubtedly have authority to engage a tug and to fix the price, and would get a lower price under this contract than he would if the indemnity clause were omitted. The decision of the Court of Appeal in *Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (4) was reversed in the House of Lords (5), and the dictum of Brett M.R., although possibly not dissented from, is therefore not an authoritative statement. Further, the question in that case was not as to whether the shipowners were bound but whether cargo owners

(1) (1877) 2 C. P. D. 416.
(2) [1917] 1 K. B. 712.
(3) (1883) 13 Q. B. D. 651, 662.
(4) 13 Q. B. D. 651.
(5) (1884) 10 App. Cas. 107.

could be bound by the master's prima facie unreasonable agreement. The tug owners are entitled to succeed, and the decree should be in the form laid down in *The Adriatic*. (1)

1919

THE LUNA.

Cur. adv. vult.

Dec. 2. HILL J. In the action of the *Frances and Jane* against the *Luna* and *Kingston*, I have already held that the tug *Kingston* was alone to blame for bringing the tow *Luna* into collision with the *Frances and Jane*. The question I have now to determine arises upon the third party notice whereby the owners of the *Kingston* claim indemnity against the owners of the *Luna* in respect of the liability to the owners of the *Frances and Jane*, and the costs of the *Frances and Jane* action. The answer to this question depends on whether the owners of the *Luna* contracted with the owners of the *Kingston* in the terms of the clause which appears in print on the document which the master of the *Luna* signed. If the contract entered into embraced that clause, and if the master of the *Luna* had authority to enter into that contract, then, subject to two points I will mention hereafter, it is not disputed that the owners of the *Luna* are liable to indemnify the owners of the *Kingston*.

First as to authority. I have no doubt that the master of the *Luna* had authority to enter into towage contracts and at least apparent authority to enter into this towage contract. It is said that the clause is unreasonable. It is, and has for many years, been usual for tug owners to protect themselves by such a clause. Nor can I see any ground for saying that it is unreasonable. It is all a question of price, just as in bills of lading exception clauses are all a question of freight. The less the liability of the tug owner or shipowner, the lower the price; the greater the liability, the higher the price. There is nothing unreasonable in a bargain which puts the work of towage on the tug and the risks of the service on the tow.

Then as to what the contract was. The document upon which the owners of the *Kingston* rely is a document signed

(1) (1915) 85 L. J. (P.) 12.

1919

THE LUNA.

Hill J.

by the master of the *Luna*. It is common ground that that document contains a contract for the towage of the *Luna*. The contention of the owners of the *Kingston* is that the whole document is the contract. The contention of the owners of the *Luna* is that only that part of it which states the towages to be performed and the prices to be paid is the contract. If any facts beyond the facts that they both intended the document to contain the contract, and that the master signed it, are material, then the facts are as follow: [His Lordship stated the facts set out above.] Counsel for the *Luna* referred me to *Roe* v. *Naylor*. (1) I think that case does not apply to the present. That was not a case in which the document relied on as the contract had been signed. If it had been, can anyone doubt that the buyer would have been bound by it? As Atkin J. said: "If a party signs the document he is taken to have assented to the terms contained in it." So in the ticket cases like *Richardson, Spence & Co.* v. *Rowntree* (2) and *Marriott* v. *Yeoward Brothers* (3), depending not upon signature but on knowledge or notice, can anyone doubt that if such a ticket is signed the passenger is bound? Here I am dealing with a document admitted to be a contract, and signed by the party who says that a part of its contents is to be rejected as not forming part of the contract. There is no suggestion or ground for suggestion of any deceit. The master was not trapped into signing one thing, thinking it to be something quite different. There was no common mistake on which the contract, if it had not been performed, could be rectified. The document was signed, and signed with the intention of its being a contract. The master, in my view, is bound by the contract, whether he read it or not, and, therefore, the owners of the *Luna*, whose agent he was, are bound, too.

It is suggested that the contract of indemnity did not apply because in the *Frances and Jane* action I have found, in fact, that those on board the tug were not the servants of the owners of the *Luna*. There is, in my opinion, nothing in

(1) [1917] 1 K. B. 712, 716, and on appeal, 119 L. T. 359.

(2) [1894] A. C. 217.

(3) [1909] 2 K. B. 987.

that. If they had, in fact, been the servants of the owners of the *Luna*, then no contract of indemnity would have been required. The owners would have been liable for the acts of their servants. But the contract contemplates a case in which those on board the tug are not the servants of the tow, but are to be deemed to be so for the purposes of the contract between the tug owners and the tow.

It is further contended that the contract does not apply to a case where the tug was engaged in towing two tows, which was the fact here, and that the clause is only applicable when the tug is towing one tow. I cannot find anything in the contract to justify that contention. The contract provides for more than one tow.

I, therefore, find that the contract is as alleged by the owners of the *Kingston*, and that it amounts to a contract to indemnify the owners of the *Kingston* against the damages they will have to pay, and against the costs in the action of the *Frances and Jane*.

The order will be as in *The Adriatic* (1)—namely, that the plaintiffs (the plaintiffs in the third party proceedings) are entitled to be indemnified by the defendants (the owners of the *Luna*) against the damages assessed against the tug owners in the collision action, and the costs payable by them to the plaintiffs in that action and also their own costs in that action; and to an order for payment to them of such damages and costs; and I give judgment for the present plaintiffs accordingly.

Solicitors for the plaintiffs: *J. A. & H. E. Farnfield.*

Solicitors for the defendants, the owners of the *Luna*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for the defendants, the owners of the *Kingston*: *C. J. Smith & Hudson, for Locking, Holdich & Locking, Hull.*

(1) 85 L. J. (P.) 12.

E. C. T.

[IN THE COURT OF APPEAL.]

C. A
1919
Nov. 10.

THE PORTO ALEXANDRE.

[1919. N. No. 1315.]

Admiralty—Public Vessel—Immunity from Process of Arrest—Trading by Public Vessel.

A vessel owned or requisitioned by a sovereign independent state and earning freight for the state, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest, by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals.

The Parlement Belge (1880) 5 P. D. 197 considered and applied.

APPEAL from a decision of Hill J. setting aside the writ in rem and all subsequent proceedings against the steamship *Porto Alexandre*.

The *Porto Alexandre*, formerly the German-owned steamship *Ingbert*, a vessel of 2,699 tons gross, by a decree of the Portuguese Prize Court of January 30, 1917, was adjudged a lawful prize of war. She had previously been requisitioned by the Portuguese Government and handed over to the Commission of Services of Transports Maritims and was being employed in ordinary trading voyages earning freight for the Government.

In September, 1919, she loaded a cargo of cork shavings for carriage to Liverpool under a bill of lading from which it appeared that the cargo was shipped by and consigned to the Portuguese Import and Export Co., Ld. On September 13, when in the Crosby channel at the entrance to the Mersey, the vessel got aground and salvage services were rendered to her by three Liverpool tugs, the *Nora*, *Expert* and *Torfreda*. On September 16 a writ in rem was issued on behalf of the owners, masters and crews of these tugs in respect of the services against "the owners of the Portuguese steamship *Porto Alexandre* her cargo and freight." On September 24 the solicitors for the defendants accepted service of the writ and undertook to appear on behalf of the cargo owners, and on September 25 entered appearance "under protest" for the

owners and freight. On October 2 a motion was set down to set aside the writ and all subsequent proceedings on the ground that the *Porto Alexandre* and the freight "were and are the public national property of and/or requisitioned by and in the possession and public use and service of the Portuguese Government." The motion came before Hill J. on October 20 and 27, 1919, and was supported by a communication from the Portuguese Chargé d'Affaires to Lord Curzon, the Secretary of State for Foreign Affairs, who in turn communicated it to the learned judge, that the *Porto Alexandre* was "a state-owned vessel belonging to the Government of the Portuguese Republic."

Hill J. in giving judgment said that he had arrived at his decision with the greatest reluctance. Upon the facts he was prepared to find, if it were necessary, that the *Porto Alexandre* was being used in ordinary commerce, and that the only interest of the Portuguese Government was in the earning of freight. But in his view the law as laid down in *The Parlement Belge* (1) was that a sovereign state could not be impleaded either by being served in personam or indirectly by proceedings against its property; and if that were the principle it mattered not how the property was being employed. His Lordship continued: "I think therefore that this motion succeeds upon the ground that it is established that this ship was the property of the Portuguese Government at the time of arrest and is now its property. It therefore follows that so far as the ship and freight are concerned, the writ and all subsequent proceedings must be set aside, but the writ and all subsequent proceedings so far as the cargo is concerned, will remain good. I have already, in previous cases, pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn, as this is being withdrawn, from the Courts, but I have only to assert now what I conceive to be the law."

The plaintiffs appealed.

Nov. 10. *C. R. Dunlop K.C.* and *J. B. Aspinall* for the

(1) 5 P. D. 197.

C. A. 1919

THE PORTO ALEXANDRE.

appellants. Although a sovereign ruler cannot be impleaded even in respect of private transactions, international comity does not extend the same immunity to the property of states unless employed in the public service. The decision of the Court of Appeal in *The Parlement Belge* (1) no doubt qualifies to some extent the views of Sir Robert Phillimore as expressed in the Court below in that case (2) and in *The Charkieh.* (3) But the Court of Appeal, in reversing Sir Robert Phillimore, took a different view of the facts, and the case is not an authority for the proposition that a foreign state-owned merchant ship engaged on an ordinary mercantile voyage is immune from the process of arrest. The *Parlement Belge* was a mail-boat, and although carrying passengers and cargo, this was merely ancillary to her real employment, which was that of carrying the Belgian State mails. The correct view was that stated by Marshall C.J. in an old American authority (*U.S. Bank* v. *Planters' Bank* (4)), that "when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character." [*The Prins Frederik* (5) was also referred to.]

D. Stephens K.C. and *A. W. Grant* for the respondents were not called on.

BANKES L.J. This is an appeal from a decision of Hill J., who made an order that the writ and warrant for arrest, and all subsequent proceedings against the *Porto Alexandre* and freight, be set aside, but the proceedings against the cargo should stand. The learned judge was only concerned with the question of the ship, and this appeal has only reference to the ship.

The vessel in question was on a voyage from Lisbon to Liverpool, and she ran aground in the Mersey, and three tugs were engaged to get her off. An action was brought, and the ship was arrested in respect of the services rendered to her by these tugs. The application which the learned judge granted was founded upon the contention that the vessel was the

(1) 5 P. D. 197.
(2) (1879) 4 P. D. 129.
(3) (1873) L. R. 4 A. & E. 59, 74.
(4) (1824) 9 Wheat. 904, 907.
(5) (1820) 2 Dods. 451.

property of a sovereign state, the Republic of Portugal, and, on that ground, that she was exempt from arrest. The conclusion of fact at which the learned judge arrived was that it had been established that the ship was the property of the Portuguese Government at the time of the arrest, and is still their property, and on that ground he made the order.

It is now contended that it is not sufficient for a sovereign or a sovereign state to allege that a vessel is the property of such sovereign or sovereign state, and that the allegation must go further and say the vessel is employed in the public service or on public service.

The facts with regard to the vessel are as follows: She was originally a German merchant vessel, and in August, 1916, she was requisitioned by the Portuguese Government. On August 11 what is called a passport was issued, which authorized the employment of the vessel and contains notes upon it, indicating that during the period that the vessel was at the service of the Portuguese Government, for which she was requisitioned, her port of register should be Lisbon. There is also an indorsement on the passport stating that on January 30, 1917, she was adjudged a lawful prize of war. Mr. Dunlop has pointed out that the statement that she was adjudged a lawful prize of war leaves it doubtful whether she has become the actual property of the Portuguese Government, or whether she was merely detained pending the conclusion of peace. It would rather appear that the latter is the proper conclusion, because there is an affidavit by the Portuguese vice-consul at Liverpool, who says that the vessel is, and has been, requisitioned by the Portuguese Government for the service of the State, and is employed under the orders of the Government. There is a further statement in writing by the Portuguese Consul at Liverpool, in which he says in reference to this particular voyage that the freight on the cargo was paid before shipment and belongs solely and entirely to the Portuguese Government. In addition to that, there is a letter from the Portuguese Chargé d'Affaires, in which he states definitely that the *Porto Alexandre* is a public service vessel belonging to the Portuguese Government.

C. A. 1919

THE PORTO ALEXANDRE.

Bankes L.J.

There is no reason to doubt the accuracy of the statements that have been made on affidavit in this case—that the vessel has been requisitioned under the order of the Portuguese Government, and that on the particular voyage she was carrying freight for that Government. Mr. Dunlop, however, contends that is not sufficient, because it is shown she was engaged in what he says was an ordinary commercial undertaking, as an ordinary trading vessel carrying goods for a private individual or a private company. The question is, whether it is possible in the circumstances of this case to distinguish it from *The Parlement Belge* (1), which was a decision of this Court, and is binding upon us.

I gather from the judgment of Hill J., and from what has been said by learned counsel, that this question is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest.

The function of this Court in this particular case is to decide whether it is covered by *The Parlement Belge*. (1) I think it is, and it is therefore not necessary or desirable that the Court should enter upon a discussion of the wider question at this stage, or consider the importance of other views that may be taken. There is very little difference between the material facts in *The Parlement Belge* (1) and in the present case, and in my opinion *The Parlement Belge* (1) is an authority which covers the present case. It is quite true that in many of the earlier cases the claim put forward, with regard to a particular ship, was that she was on public service and employed in the public service, and no doubt the statement so made was applicable to the particular case, and was made because it was applicable to the particular case, and the judgments were

(1) 5 P. D. 197.

delivered in reference to the facts so stated. But in this case the Court is bound by the decision in *The Parlement Belge* (1) and the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. I think the case is clearly covered by the decision in *The Parlement Belge* (2), and, that being so, we have no alternative but to dismiss the appeal.

In the present case, the facts proved appear to me to amount to this : It is first proved that the ship in question is a public vessel, the property of the Portuguese Government ; next it is proved by the affidavits that it is in their possession for the service of the State ; and, thirdly, it is proved that it is employed under the orders of the Government. There is one passage in the judgment of Brett L.J. in *The Parlement Belge* (2) in which he is expressing what he considers to be the result of the judgment in *Briggs* v. *Light Boats* (3), an American case, of which he obviously approves and on which he founds his own conclusion. He says : " The ground of that judgment is that the public property of a Government in use for public purposes is beyond the jurisdiction of the Courts of either its own or any other State, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public movable property of a State, which is in its possession for public purposes in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all Courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State." And then again, when he is summing up the principle which he thinks is to be deduced from all the cases he says : " As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines

(1) 5 P. D. 197. (2) 5 P. D. 213, 217.
(3) (1865) 93 Mass. 157.

C. A. 1919

THE PORTO ALEXANDRE.

Warrington L.J.

to exercise, by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or "—and these are the material words—"over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Whatever may be the actual use to which this ship is put, I think the evidence is quite sufficient to show that it is the property of the State, and is destined to public use; and, that being so, the case seems to me to come exactly within the principle of the judgment in *The Parlement Belge* (1), with the result which I indicated at the beginning of my judgment.

SCRUTTON L.J. In this case the *Porto Alexandre* came into the Mersey, got on to the mud, and was salved by three Liverpool tugs. On arresting her to obtain security for the payment of their salvage, the Portuguese Republic, through the Portuguese Chargé d'Affaires, put foward a statement that she was a public vessel of the Portuguese Republic, and was therefore exempt from any process in England. Accordingly the defendants moved to set aside the writ and arrest. Hill J. in the Admiralty Court granted the application and the plaintiffs' appeal to this Court.

Now this state and other states proceed in their jurisprudence on the assumption that sovereign states are equal and independent, and that as a matter of international courtesy no one sovereign independent state will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign state; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that states do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent states and their sovereigns. I think it has been well settled first of all as to the sovereign that there

(1) 5 P. D. 197.

are no limits to the immunity which he enjoys. His private character is equally free as his public character. If he chooses to come into this country under an assumed name and indulge in privileges not peculiar to sovereigns, of making promises of marriage and breaking them, the English Courts still say on his appearing in his true character of sovereign and claiming his immunity, that he is absolutely free from the jurisdiction of this Court. That is the well-known case of *Mighell* v. *Sultan of Johore*. (1) It has been held, as Mr Dunlop admits, in *The Parlement Belge* (2) that trading on the part of a sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador coming here as an ambassador of the sovereign may engage in private trading, but it has been held that his immunity still protects him even from proceedings in respect of his private trading. Jervis C.J. in *Taylor* v. *Best* (3), said: " . . . . if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our Court, by engaging in commercial transactions, that may raise a question between the Government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character,—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy." There being no limitation in the case of the sovereign, and no limitation in the case of the ambassador, is there any limitation in the case of the property? Mr. Dunlop has argued before us that in the case of property of the state there is a limitation, and that—as I understand him—if the property is used in trading that cannot be for the public service of the state. That is not the way in which

(1) [1894] 1 Q. B. 149. (2) 5 P. D. 197.
(3) (1854) 14 C. B. 487, 519.

C. A. 1919

THE PORTO ALEXANDRE.

Scrutton L.J.

he expressed it, but it appears to me to be the proposition which emerges from his argument.

We are concluded in this Court by the decision in *The Parlement Belge*. (1) Sir Robert Phillimore took the view that trading with the property of a state might render that property liable to seizure; but the Court of Appeal in *The Parlement Belge* (1) overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the Court. Brett L.J. said: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use." One of the reasons given seems to me conclusive: the moment property is arrested in the Admiralty Court a proceeding is instituted against the person, and the person is compelled to appear if he wants to protect his property, and by seizing his property the personal rights of the sovereign or the personal rights of the state are interfered with. The position seems to me to be very accurately stated in the 7th edition of Hall's International Law at p. 211, where, after dealing with warships and public vessels so called, Mr. Hall goes on to deal with other vessels employed in the public service and property possessed by the state within foreign jurisdiction, and says: "If in a question with respect to property coming before the Courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state."

I quite appreciate the difficulty and doubt which Hill J. felt in this case, because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about

(1) 5 P. D. 197, 217.

without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these Courts. *The Parlement Belge* (1) excludes remedies in these Courts. But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states. While appreciating the difficulties which Hill J. has felt, I think it is clear that we must, in this Court, stand by the decision already given, and the appeal must be dismissed.

Solicitors for the appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

(1) 5 P. D. 197, 217.

E. C. T.

1919

Dec. 8, 19, 20

DIVORCE.

SPENDLEY *v.* SPENDLEY AND GOARD.

HOBBS *v.* HOBBS.

Divorce—Practice—No Appearance by Co-respondent or Respondent—Affidavit of Service—Evidence of Identity of Person served.

In all cases in which a party served with the petition, whether respondent or co-respondent, does not appear, the affidavit of service must prove the identity of the person served with the party to the action. If the affidavit fails to do this, the identity must be proved at the hearing.

THE first case was a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The adultery was proved.

SPENDLEY *v.* SPENDLEY AND GOARD.

T. Bucknill for the petitioner. I ask for the usual decree nisi with costs.

[THE PRESIDENT (SIR HENRY DUKE). What evidence have you that the person served was the person against whom you have proved the adultery ?]

I have none except the usual formal affidavit of service. In recent years that was accepted as sufficient but lately the practice has been unsettled. It would be convenient to practitioners if the Court would give some indication what the practice ought to be.

THE PRESIDENT (SIR HENRY DUKE). An unsatisfactory practice has grown up with regard to accepting affidavits of service as proof of identity. When neither the respondent nor the co-respondent is taking any part in the proceedings, the only proof that the persons served are the parties to the proceedings, according to the present practice, is supplied by an affidavit by the solicitor's clerk or other process server, which does not show any reason for supposing that he knows the parties. It may very well be that the

rules under which the affidavits of service are framed will have to be amended.

It would be quite possible to frame an affidavit of service which would comply with the rules and yet safeguard the parties from the risk of finding the decree delayed by an adjournment for the necessary technical proof of the identity of the person served.

In this case it is necessary that the process server should give evidence to show the grounds upon which he is able to state that the man served was the person charged with adultery. If he cannot show this he was not really in a position to make the affidavit. The rules applying to this matter contemplated that the person swearing the affidavit should really be able to swear that he served the right person.

As the evidence stands I can pronounce a decree without costs; but if costs are asked against the co-respondent the case must stand over for further evidence. Practitioners must cease to rely upon merely formal affidavits for the purpose of identifying the parties. Injustice may easily be done by any neglect of attention to this important matter.

HOBBS *v.* HOBBS.

Dec. 19, 20. This was a wife's petition for divorce on the ground of her husband's adultery and cruelty. The husband did not appear. The adultery and cruelty were proved, but the same difficulty arose as to proof of identity of the person served with the husband, who was a soldier serving in the 18th Hussars.

Grazebrook for the petitioner.

The solicitor's clerk who served the petition gave evidence that on July 10, 1919, he attended at Hounslow Barracks and asked a serjeant if he could see Private Hobbs. The serjeant pointed out a man, and the clerk asked him if he was James Henry Hobbs; the man said "Yes," and he handed him copies of the citation and petition and

1919

SPENDLEY v. SPENDLEY AND GOARD.

HOBBS v. HOBBS.

showed him the originals. He glanced at them, then rolled up separately the copies, and said, "All right."

The case then stood over for further evidence.

Dec. 20. The case was again brought on and evidence was given that since the date of service the respondent had gone to India with his regiment and could not now be personally served.

THE PRESIDENT (SIR HENRY DUKE). Under the circumstances I will accept the evidence in this case.

For the future I think that either by rule issued or a direction given by me as President, means will be taken for securing that affidavits of service shall show the means of knowledge of the deponent as to the identity of the person served. (1) If that course is carefully observed, I should think in ninety-nine cases out of one hundred the affidavit of service will be satisfactory proof, that is a prima facie establishment of effective service. If in the course of the case doubt arises as to whether the service has been effective, so far as my own view is concerned I should regard it as my duty not to make the decree until I was satisfied that the service had been effective. The common form of affidavit is purely formal and leaves it to the discretion of the draftsman of the affidavit to put in such facts as shall be cogent to satisfy the Court that there is real knowledge of identity.

Solicitor in *Spendley* v. *Spendley & Goard : R. W. White.*
Solicitors in *Hobbs* v. *Hobbs : Lambert & Hale.*

(1) On January 14, 1920, the following direction was issued in the Divorce Registry by the President :—

"The affidavit as to service of citation required to be filed under r. 17 shall, in cases where the petition is filed on and after the 21st day of January, 1920, show the means of knowledge of the deponent as to the identity of the person served."

J. R. B.

(In Prize.)

THE CONSUL OLSSON.

1919
Dec.
2, 12, 16.

[1916. No. 812.]

Prize Court—Requisition—Appraisement—Erroneous Basis of Valuation—Prize Court Rules, 1914, *Order* xi.

The return to a commission of appraisement in prize is not invariably conclusive.

The claimants' goods were requisitioned and an appraisement was made without notice to the claimants. The prize proceedings resulted in the release to the claimants of the proceeds—i.e., the appraised value of the goods paid into Court by the Crown. It appeared that the valuation had been made on an erroneous basis:—

Held, that a fresh inquiry must be held into the actual value of the goods.

Claim for damages against the Procurator-General by reason of the alleged wrongful seizure of neutral goods, and for a sum to be ascertained by the Court as the real value of the goods, irrespective of an appraisement made under an order of the Court. The case is reported on the question of the effect of an appraisement under Order xi. of the Prize Court Rules, 1914. (1)

The facts, which are fully set out in the judgment, shortly stated were as follows: The claimants, a Swedish company,

(1) Order xi., r. 1 (as amended by Order in Council of April 29, 1915): "The Judge may at any time on the application of the Marshal or any party, make such order as to the removal, safe custody or preservation of a ship [or goods] as he may think fit, and may at any time order the ship [or goods] to be appraised, if not already appraised and sold."

Rule 2: "The appraisement and sale of a ship [or goods] the removal and survey thereof . . . . shall be effected by the Marshal under the authority of a commission."

The form of commission of appraisement and sale commands the Marshal "to reduce into writing an inventory of the said [ship or goods] and having chosen one or more experienced person or persons, to swear him or them to appraise the same according to the true value thereof, and upon a certificate of such value having been reduced into writing, to cause the said [ship or goods] to be sold by public auction for the highest price, not under the appraised value thereof, that can be obtained for the same."

1919

THE CONSUL OLSSON.

were the owners of a cargo of rock phosphate which was seized as prize. The cargo was requisitioned on behalf of the Ministry of Munitions, and, without notice to the claimants, under an order of appraisement was appraised at the value of 16,420*l.* 18*s.* 7*d.* At the hearing of the action for condemnation of the cargo, the Attorney-General, on behalf of the Procurator-General, agreed to the proceeds of the cargo being released forthwith and all other questions postponed.

The claimants now sought to recover damages and costs and also payment of a sum to be ascertained by the Court as the fair value of the cargo at the time of seizure irrespective of the appraisement. The Procurator-General contended that the sum fixed by the appraisement represented the value of the cargo for all purposes and was conclusive. It appeared that the cargo had been appraised merely as a cargo of phosphates for fertilizing purposes without taking into account the urgent demand for phosphates in the manufacture of munitions of war.

Dec. 2, 12. *R. A. Wright K.C.* and *Sir Robert Aske* for the claimants.

Balloch for the shipowners.

Sir Gordon Hewart A.-G. and *C. W. Lilley* for the Procurator-General.

[The arguments and all the cases cited are set out in the judgment.]

Cur. adv. vult.

Dec. 16. THE PRESIDENT (SIR HENRY DUKE). This is the claim of the Skanska Superfosfat and Svafvelsyre Fabriks Aktiebolaget of Helsingborg, a company incorporated in Sweden, in respect of about 4000 tons of rock phosphate, the cargo of the Swedish steamship *Consul Olsson* on a voyage from Port Tampa, Florida, U.S.A., to Helsingborg. In the course of this voyage, in October, 1915, the *Consul Olsson*, upon examination at Kirkwall, was seized with her cargo and ordered to Swansea, where in November, 1915, the cargo was discharged and made the subject of the suit in which this claim is made. The ship was released upon

1919

THE CONSUL OLSSON.

The President.

completion of the discharge of her cargo. The cargo at a later date was requisitioned by the Crown. The legality of the requisition is not questioned. The claimants duly appeared in the suit and made a claim for delivery of the goods as neutral property destined for Sweden, and payment of damages and costs by reason of the seizure; and alternatively they claimed an equivalent amount as moneys payable to them in reason and fairness for the forced requisition. The claim is founded upon the alleged cost of the phosphates inclusive of freight and expenses, the trade profit expected to have been made in the claimants' business after manufacture of the phosphates into superphosphates, and interest upon these amounts from 1915 to 1919.

Pending the claim, namely, on March 17, 1916, but without notice to the claimants, appraisement was made of the phosphates under an order of the Court, dated March 2, 1916. The amount of such appraisement, 16,420*l.* 18*s.* 7*d.*, was paid into Court by the Crown in August, 1917, and subsequently under orders of the Court paid out as to 9000*l.* to the owners of the ship, as to 1641*l.* to owners of cargo and as to 4000*l.* to a deposit account. On the part of the Crown the appraisement and payment into Court of the amount are relied upon as making full satisfaction of all claims of the claimants cognizable in this Court. The right of the claimants to maintain a claim against the captors for damages and costs by reason of the circumstances of the seizure and detention and disposal of the goods, the existence of a general rule that an appraisement of goods in prize is conclusive, and the question whether the appraisement in the present case is binding upon the Court and the claimants so as to exclude inquiry as to the true value of the phosphates, were the matters chiefly discussed at the hearing.

I will deal first with the claim for damages against the captors. The claimants are manufacturers of superphosphates in Sweden on a very considerable scale, and they distribute their products by various agencies, but chiefly through co-operative societies, among the agricultural population of Sweden. In 1915 their supplies of phosphates from America,

1919

THE CONSUL OLSSON.

The President.

which they ordinarily obtained under contracts for shipment made in advance of their requirements, were interrupted by reason of the war, and they purchased individual cargoes and chartered tonnage for conveyance of the same to Sweden. Four of these cargoes were seized, but the only cargo in respect of which the proceedings for condemnation were carried to a hearing was the one now in question. The remaining cargoes were released after inquiry made on behalf of the Crown, and the ultimate releases took place under an arrangement which was the result of prolonged negotiation between the Treasury Solicitor and the agents of the claimants. The grounds on which the various vessels were detained were that the total shipments appeared to the advisers of the Crown to be so largely in excess of Swedish requirements for home consumption as to raise a presumption that the goods were in truth purchased for German account. Guarantees against exportation were insisted upon, and it was also stipulated that one cargo should be sold in England. The claimants submitted to these requirements and procured the necessary guarantees, and the cargo retained in England was acquired at an agreed price by the Ministry of Munitions. In and after November, 1915, phosphates for the manufacture of munitions were required in large quantities by that Ministry.

On behalf of the claimants it was urged upon me that the proceedings in prize against the cargo of the *Consul Olsson* were not continued in good faith in the belief that her cargo was properly subject to condemnation, but were used to secure satisfactory general guarantees from Sweden against the exportation of phosphates, and to induce the claimants to place phosphates at the disposal of the Ministry of Munitions. These allegations are, in my judgment, wholly unfounded. The Procurator-General, at the earliest possible date after seizure, differentiated the cargo of the *Consul Olsson* from the various other cargoes. After making inquiries in November and December, 1915, he notified the solicitors for the claimants that the cargo would have to be adjudicated upon by the Prize Court. In January, 1916, he repeated this.

In May, 1916, upon hearing from the solicitors that they supposed there were negotiations which included this cargo, he reaffirmed his decision. It was contended further for the claimants that there were no substantial grounds for detaining the cargo at the time when the ship was ordered to Swansea, or alternatively at the time of the discharge of the cargo. The release of the cargo, or its proceeds, which was consented to when the case came on for hearing, ought, it was said, to have been made at one of those times. As to this part of the case, the evidence before me deals with times before, at, and after the date when the Procurator-General decided upon directing the detention of the cargo. The information of the Procurator-General, from a series of intercepted messages, and from various sources of business information, was that the shipment of the phosphates on the *Consul Olsson* had been arranged by the enemy house of Beer, Sondheimer & Co., of Frankfort-on-Main, through persons and firms associated with them in Europe and America, including an agent in Stockholm who acted as intermediary for the conduct of their correspondence between Germany and the United States; that they had at about the time of the shipments in question opened large credits in New York; and that the usual European agent of the vendors of the American phosphates, who would have made sales only against guarantees for consumption in neutral countries, had been passed over in this transaction. The value of the phosphates in the manufacture of certain explosives was also well known. The inquiries of the Procurator-General concerning these matters were in progress at and after the time when he decided to claim condemnation of the cargo. Under the circumstances I am satisfied that the seizure and proceedings in prize were warranted by the information in the possession of the Procurator-General, and that no step in the matter was taken for either of the indirect purposes alleged on behalf of the claimants. I therefore disallow the claim which is made for damages and costs on the ground of unwarrantable seizure.

The further claim is for payment of a sum to be ascertained by the Court as the fair value of the cargo at the time of the

1919

THE CONSUL OLSSON.

The President.

seizure irrespective of the appraisement relied upon by the Crown. In order to determine the legal effect of the appraisement, it is necessary to be clear as to the process by which it came into being. The seizure of the cargo having been made on October 25, 1915, at Kirkwall, and the discharge completed on December 2, at Swansea, on December 17 the Procurator-General, by the Treasury Solicitor, wrote to the solicitors for the claimants that the cargo would have to be adjudicated upon in the Prize Court, and asked if the claimants would consent to a sale. No consent was given. On December 21, the claimants not having then appeared, upon notice given to their solicitors as representing the owners of the ship, an order was made in the Registry authorizing requisition of the cargo (with the exception of a sufficient quantity for sampling) without appraisement. This order was obtained at the instance of the Ministry of Munitions. On March 2, 1916, an order was made for appraisement of the cargo, and on March 4 a commission of appraisement issued to the Marshal in the proper form in prize directing him "to reduce into writing an inventory of the said cargo and having chosen one or more experienced persons to swear him or them to appraise the same according to the true value thereof and upon a certificate of such value having been reduced into writing . . . . to file the certificate of appraisement signed by you and the appraiser or appraisers together with this commission." The return duly made to the commission includes the certificate of the appraisement at 16,420*l.* 18*s.* 7*d.* relied upon by the Crown by way of answer to the present claim. It bears date September 4, 1916. At the time of the requisition and of the commission for appraisement the claimants had not appeared. At the date of the execution of the commission the cause of condemnation had been determined in their favour so far as regards the claim of the Crown against the cargo. The appraisement therefore was an appraisement of goods found by the Court to be their goods.

On July 20, 1916, at the hearing of the action, the Attorney-General had stated on behalf of the Crown that he had agreed

1919

THE CONSUL OLSSON.

The President.

with counsel for the claimants that the proceeds of the cargo should be released forthwith "all other questions as between the Crown and the respective claimants and as between the claimants themselves being postponed." On July 29, 1916, an order had been made by consent for disposition of a sum of 16,420*l.* 18*s.* 7*d.*, which was stated to be the amount of the "net proceeds of sale" of the cargo—though no sale had taken place—and on August 28, 1916, an order was drawn up directing payment to solicitors of 9000*l.* on behalf of the shipowners and 1641*l.* on behalf of the present claimants, and that 4000*l.* should be placed on deposit, and the balance of 1779*l.* 18*s.* 7*d.* "left in Court." The payment into Court of the sum of 16,420*l.* 18*s.* 7*d.* pursuant to the appraisement appears not to have been actually made until August, 1917.

Some importance was attributed by counsel for the Crown to the course of the proceedings before the present dispute. I will therefore state briefly the successive events from the time of the seizure till the setting down of the present claim for hearing. On December 17, 1915, the Treasury Solicitor suggested to Messrs. Botterell & Roche—on behalf of the claimants—they being then solicitors in the cause for the owners of the ship, that an order for a sale of the cargo should be obtained to save warehousing charges. Four days later the requisition order was made. Messrs. Botterell & Roche desired to examine the relevant documents in the interest of their clients, and when these had been furnished the Treasury Solicitor gave instructions for a valuation of the cargo, which was made by Messrs. W— & Co., and which is, in substance, the same appraisement as is now in question. Messrs. Botterell & Roche were informed of this. They proposed a settlement of the value by agreement. The Treasury Solicitor, on January 5, 1916, suggested that they should accept the valuation already made, and on January 6, 1916, wrote that "the cargo will be appraised by the Court in due course," and also stated that "Messrs. W— & Co. are advising the Admiralty Marshal in the case." In May, 1916, when Messrs. Botterell & Roche had been informed definitely that the proceedings for condemnation of the cargo would be continued, and

BIBL. LONDIN UNIV.

1919

THE CONSUL OLSSON

The President.

that the cargo was requisitioned, "and its value will be ascertained by appraisement and in the usual way," they sought the consent of the Treasury Solicitor to their having leave to appeal against the requisition. This was refused. They then appeared for the claimants in the cause for condemnation, and they have since conducted the proceedings on the claimants' behalf. From the date of the payment into Court until the summer of 1917 negotiations were intermittently proceeding for a settlement of the question at issue between the claimants and the Crown. The Ministry of Munitions in particular pressed in August and September, 1916, and in May and June, 1917, that means should be found of disposing of the differences either by agreement or adjudication. On May 22, 1917, Messrs. Fox, Ray & Co., for the Ministry of Munitions, wrote to the claimants' representatives, "our valuation is about five guineas per ton and your claim about seven." At length when the claimants demanded compensation for lost profits and detention of the ship the Ministry of Munitions decided that the matter must come to this Court. As yet the payment into Court had not taken place. An inquiry of Messrs. Botterell & Roche as to what would be the amount of the payment resulted in an intimation from the Treasury Solicitor on June 28, 1917, that the cargo had been the subject of appraisement. Some accidental delay then occurred. On August 6, 1917, Messrs. Botterell & Roche wrote, as the fact was, that they had not been aware of any appraisement. On August 9, they suggested that the value was still to be settled by the Court under the procedure as to requisitioned ships prescribed by Order XXIX., r. 4, of the Prize Court Rules, 1914. On August 18, 1917, the Treasury Solicitor set up the contention now relied upon on behalf of the Crown that the sum fixed by the appraisement represents the value of the cargo "for all purposes," and in August there was payment into Court of the amount.

From the foregoing facts some material conclusions result. The proceedings for appraisement were not consented to or acquiesced in by the claimants so as to bind them if they

1919

THE CONSUL OLSSON.

The President.

are not otherwise bound. They had no notice of the application for appraisement. The appraisement was not made in the ordinary course of prize procedure, either to enable the Court to determine upon a reserve price for a sale, or to fix bail for a release, or to settle the amount of security in a prize salvage claim. Evidence was given before me further as to the basis of the appraisement. The cargo was shown to have been valued merely as a cargo of phosphates lying undisposed of in an English port for which no buyer was in view and which must await a buyer under the then existing conditions of the English trade in phosphates for the manufacture of fertilisers. The valuation took no account of the Swedish demand, naturally, and perhaps necessarily, but it also took no account of the urgent demand there then was in England for phosphates for the manufacture of munitions of war. It is said, nevertheless, that "the sum fixed by the appraisement represents the value of the cargo for all purposes."

The conclusion contended for by counsel for the Crown in answer to the demand of the claimants is not based upon any enactment or express decision, but is said to result from the well-ascertained practice of the Court. Passages in Story's Principles and Practice of Prize Courts, Pratts' ed., pp. 87–89, were relied upon, and I was referred to decisions in the Admiralty jurisdiction such as that of Dr. Lushington in *Cargo ex Venus* (1), and Sir Samuel Evans P. in *The San Onofre* (2), which were said to treat the return to a commission of appraisement as a conclusive determination of value which may not be impeached by evidence. These decisions do not appear to me to support the argument which was founded on them. In the case of appraisements in salvage suits the parties are properly bound by reason of the nature of the proceedings and by their own acquiescence. Moreover, in the Admiralty jurisdiction, the learned judges whom I have mentioned safeguarded the power of the Court to consider the effect of an appraisement if justice should

(1) (1866) L. R. 1 A. & E. 50. (2) [1917] P. 96.

1919

THE CONSUL OLSSON.

The President.

so require, and in *The Hohenzollern* (1) the President, Sir Gorell Barnes, and Bargrave Deane J., took practical steps by virtue of that power. The present case, however, is a case in prize, and the procedure in question is the procedure in prize, and not that under the Admiralty Rules in relation to salvage.

Under the Prize Rules now in force appraisements may be ordered by the Court for various purposes. Appraisements for purposes of prize salvage under Order xxx. can be put out of the case. The procedure there is analogous to the Admiralty procedure in salvage, and the captors and claimants are both before the Court. The procedure in cases of requisition by the Admiralty is again a special procedure. So far as regards appraisement it is sufficient to say that this was not such a case, that in such cases either party may, under Order xxix., r. 4, require that the Court shall fix the amount to be paid by the Crown, and that upon a reference of the matter to the Registrar the Court may still be called upon to review the Registrar's report, although that report would be made after hearing the parties. Order xi., which relates to appraisement of cargo before condemnation, is the order which is in question in this case. It provides for mere appraisement and also for appraisement and sale. The authorized form of commission for appraisement and sale directs that the sale shall be "for the highest price not under the appraised value that can be obtained." Mere appraisement would not have been conclusive against the claimants if a sale had been ordered. Yet, appraisement without sale is said to have that effect automatically, upon production to the Court of a return in due form to a commission regularly issued. I am satisfied that this proposition is too widely stated. Commission of appraisement was a process known in English procedure long before it came to be used in matters of prize. Gilbert C.B., in his Treatise on the Exchequer, pp. 112, 182, published in 1758, describes its application and uses under the ancient practice

(1) [1906] P. 339.

of the Exchequer with regard to goods alleged to be forfeited to the Crown but not already adjudged forfeited. The appraisement there was a precautionary valuation, although it was made with the help of a jury. The Prize Act of 6 Anne, c. 13, provides for appraisement of prize not by judicial process but by agreement between nominees of the interested parties. The proceedings in prohibition and the judgment of Lord Loughborough in *Brymer* v. *Atkins* (1), the argument of Sir William Scott in *Smart* v. *Wolff* (2), and the proceedings and judgments in *Willis* v. *Commissioners of Appeals in Prize Causes* (3), afford a good deal of information as to the origin and operation of commissions of appraisement in prize. In these cases the commission of appraisement was issued to ascertain what security should be required as a condition of the release or retention of captured property before condemnation, and it was made clear in *Brymer* v. *Atkins* (1) and in *Smart* v. *Wolff* (2) that a party who obtained release of captured goods by giving security to the amount of the appraised value, might be ordered to make good to his successful opponent in the cause the value of the property to an amount exceeding that of the bail fixed upon the appraisement. The power of the Court to secure to the successful party the full value of the ship or goods was held not to be taken away by the appraisement. Yet at that time the commission of appraisement was issued to commissioners as to whose selection the parties were heard. The Prize Act (33 Geo. 3, c. 66), s. 23, directed that appraisements of values under that Act should be made by "persons well skilled in the same, to be named by the parties, and approved and appointed by the Court." Lord Stowell, in *The Carl Walter* (4), stated it to be the regular practice of the Court that "of the commissioners of appraisement and sale one is appointed by the claimant." That an appraisement so made and acted upon should bind the parties by whose nominees it was made, for the purposes for which it was made, is intelligible, and, as I think, reasonable.

(1) (1789) 1 H. Bl. 164.
(2) (1789) 3 T. R. 323, 329.
(3) (1804) 5 East, 22.
(4) (1802) 4 C. Rob. 207, 211.

1919

THE CONSUL OLSSON.

The President.

For the interlocutory purpose of the fixing of security it certainly did bind them. But it was not conclusive for all purposes.

The provisions of the successive Prize Acts of the War of American Independence and of the wars with the French, and the procedure of the Prize Courts under the presidency of Lord Stowell, are only helpful in the present discussion so far as they show whether the return to a commission of appraisement in prize had in past times the uniform and invariable operation it is now said to have. Between 1802 and 1864 nothing occurred so far as I am aware which throws any light on the subject. Sect. 24 of the Naval Prize Act, 1864, provides as follows : " The Court may, if it thinks fit, at any time direct that the captured ship be appraised. Every appraisement shall be made by competent persons sworn to make the same according to the best of their skill and knowledge." Sect. 25 is in these words : " After appraisement, the Court may, if it thinks fit, direct that the captured ship be delivered up to the claimant, on his giving security to the satisfaction of the Court to pay to the captors the appraised value thereof in case of condemnation." These provisions do not suggest to my mind an intention that appraisement in the absence of a claimant should bind him without regard to the ordinary limitations of judicial authority. The rules in prize made by Order in Council in 1898 are, in substance, of like effect with those of 1914. None of them, nor any of the rules of 1914, is made in terms which seem to me to lead to a conclusion that the Order in Council of 1914 was designed to introduce into the practice in prize any new principle as to the effect of appraisement. Having regard to the manner in which the Legislature and the Courts have dealt with the subject of appraisement in past times, and also to the terms of the existing rules, I am unable to accept the contention that the return to a commission of appraisement has the invariable effect of finally determining for all purposes the value of the subject-matter appraised. Once this contention is excluded such a return falls to be tried by tests such as are used to determine the validity of other interlocutory

1919

THE CONSUL OLSSON.

The President.

acts in a cause. Here the proceeding was taken ex parte, although the claimant was known and was acting by solicitors, and the valuation embodied in the appraisement was made by inadvertence on an erroneous basis, and the claim which is said to be excluded is one which by consent was reserved to the claimant at the hearing of the cause.

The view of the law upon which I propose to decide this case is confirmed, I think, by the terms of a direction given, in February, 1918, by Sir Samuel Evans P., in relation to the appraisement in prize of machinery captured in and unladen from the steamship *Indianic*. I quote from the report furnished to me by the Marshal: "The President directed that the value of the machinery must be arrived at by two appraisers, one to be appointed by the Marshal and the other by the claimants, and in the case of disagreement to be settled by an umpire to be agreed upon by the two appraisers and in default of agreement by an umpire to be nominated by the Court." An appraisement so made would have bound the parties in this case.

The actual value of the cargo now in question must be ascertained by the Court, if it cannot be agreed, and the claimants must receive any sum by which the amount may prove to exceed the sum paid into Court.

Solicitors for the claimants: *Botterell & Roche.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

(In Prize.)

1919
Dec. 11, 19.

THE DOMALD.

[1916. No. 1111.]

Prize Court—Seizure of Cargo—Detention of Ship—Release of Cargo—Ship-owners' Claims for Losses and Expenses—Innocent Cargo Owners—Damages not recoverable.

Through the seizure in prize of various parcels of cargo laden on board a neutral steamship, her owners sustained losses and expenses due to her detention. The proceedings in prize resulted in the release of the cargo. A claim by the shipowners against the Crown for costs and damages having failed, they sought to recover the amount of their losses and expenses from the cargo owners on the ground, inter alia, that the deviation and detention of the ship were due to the suspicion attaching to the cargo :—

Held, that as the cargo owners were innocent and had not concealed from the shipowners any material facts, and as the loss arose solely from the justifiable exercise of belligerent rights, it must lie where it fell.

Shipowners' claim against cargo owners in respect of losses caused by deviation, detention, and unlivery of the cargo.

The facts, which are fully stated in the judgment, shortly were that by reason of the seizure in prize of various parcels of fruit and sulphur laden on board the Swedish steamship *Domald*, the vessel was detained at Kirkwall and Liverpool, and she incurred in addition various expenses in excess of those which would have been incurred if she had carried the cargo to Gothenburg, the port of destination. The proceedings in prize resulted in the release of the goods. The shipowners, who had received the full bill of lading freight, sought to recover damages and costs against the Crown on the ground that there was no reasonable cause for the seizure of the cargo, but their claim failed. The present proceedings were then instituted against the respective owners of the parcels of goods seized as prize.

Clement Davies for the shipowners. The shipowners, who are entirely innocent parties, have suffered a considerable

1919

THE DOMALD.

loss owing to the suspicion justifiably entertained by the Crown against the consignments seized as prize. The loss therefore should fall on the owners of these consignments. There is a warranty that shippers will not ship goods likely to cause delay to the ship without informing the shipowners of the material facts: *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) *The Heim* (2) is not an authority for the proposition that under no circumstances can damages for detention be recovered against the owners of cargo. In that case the fund in Court proceeded against represented the proceeds of enemy cargo, and the learned President did not have to consider the contractual relationship between the parties. In *The Copenhagen* (3) damages for detention were refused, not because they were not recoverable on principle but because the ship herself was in delicto. In *The Friends* (4) Sir W. Scott said: "If the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there"; and in *The Juno* (5) expenses as well as freight were awarded against the cargo. The principle governing the numerous cases in which, unsuccessfully, shipowners have claimed damages against the Crown, e.g., *The Stigstad* (6), *The Juno* (7), are not applicable to claims against cargo owners. Furthermore, in the present case the amounts claimed are recoverable under the express terms of clauses 8 and 9 of the bills of lading [set out in full in the judgment].

Inskip K.C. (*Balloch* with him) for the cargo owners. The shipowners have received the full bill of lading freight, although the cargo was not carried to its destination. Anything over and above this is in the nature of damages for detention, and, according to *The Heim* (2), following *The Stigstad* (6), is not recoverable. In *The Einar Jarl* (8) Lord Sterndale disallowed very similar claims to those now in question, and said that he was not going to transfer the loss from the shoulders of one innocent party to the shoulders

(1) [1916] 2 K. B. 610.
(2) [1919] P. 237.
(3) (1799) 1 C. Rob. 289.
(4) (1810) Edw. 246, 248.
(5) (1799) 2 C. Rob. 116.
(6) [1919] A. C. 279.
(7) [1916] P. 169.
(8) Note, post, p. 64.

1919

THE DOMALD.

of another. As regards the bill of lading contract, the contingencies provided for in clauses 8 and 9 in fact did not happen, and these clauses therefore give no right to compensation.

Clement Davies replied.

Cur. adv. vult.

Dec. 19. THE PRESIDENT (SIR HENRY DUKE). This is a claim by the owners of the Swedish steamship *Domald* against the Italian consignors of certain consignments of fruit and sulphur which formed part of her cargo on a voyage in 1916 from Messina to Gothenburg.

The *Domald* sailed from Messina on or about April 22, 1916, with a cargo of about 2680 tons. She called at Port Talbot for bunker coal on about May 4, 1916, and on or about May 8, 1916, her master was informed by the Customs authorities that about 187 tons of fruit and 22 tons of sulphur must be discharged. Liverpool was named as the port of discharge. The vessel proceeded to Liverpool under this direction, unloaded so much of her cargo as was necessary for the discharge so ordered, including the consignments in question, and resumed her voyage on May 20. She arrived at Gothenburg on May 25. The voyage was prolonged several days by the detention and deviation so caused at Port Talbot and Liverpool, and the ship incurred, in and about unloading and discharging the detained cargo, expenses substantially in excess of those she would have incurred in discharging the same cargo in due course at Gothenburg.

In respect of the loss of use of the ship during eleven days, the owners allege themselves to be out of pocket 212*l.*, and in respect of the increased expenses 230*l.* They make these claims against owners of identified parcels of the detained cargo, which amount in all to about 133 tons of the detained total of 209 tons, and claim to be reimbursed by the several consignees rateably in proportion to the weights of their several consignments, 133/209ths of the total amount of the alleged loss—that is, in all, 149*7l.* The consignments in question were sold by order of the Court, but the proceedings

1919

THE DOMALD.

The President.

in prize resulted in the release of the proceeds. The cargo owners claimed damages and expenses against the Crown, but their claim failed. The shipowners limit their demand in the case of each consignor to the amount of the proceeds of sale of the particular consignment. The ground of claim is expressed in these terms: "The said cargo was ordered to be so discharged because of some suspicion attaching thereto or to the shippers or consignees thereof or to its destination by the British authorities, but the shipowner was in all respects blameless, and the discharge of the cargo and the deviation and detention of the steamship *Domald* were owing to this taint attaching to such cargo, and to no fault on the part of the shipowners." The owners also allege that under certain express conditions of their bills of lading they are entitled to charge against the consignors and the cargo owners the various amounts in question. It is common ground that, apart from these conditions, the full amount of the freight payable for the conveyance of the goods from Messina to Gothenburg has been paid.

The cargo owners did not dispute in the arguments before me the jurisdiction of the Court to entertain the claim of the shipowners, in both branches of it, but resisted the claim on grounds of legal principle and on the authority of decided cases.

The relevant clauses of the bill of lading provide as follows: "Owners reserve the right to confiscate for their benefit all cargo incorrectly described or addressed to feigned receivers, or to any firm not prepared to give a declaration that the goods will not be re-exported, but exclusively consumed in Sweden. Failing such declaration and bankers' guarantees for the same if demanded, they reserve a right to withhold or discharge the goods anywhere; their liability then to cease and any charges incurred in consequence to be a lien upon such goods." The foregoing stipulations were comprised in special clauses apparently added to the owners' common form bill of lading in the course of this war. The printed conditions upon the bill of lading as originally prepared included two which were relied upon. No. 8 provided that

1919

THE DOMALD.

The President.

in case the vessel should be prevented from reaching her destination by, inter alia, blockade, war, or the hostile act of any Power, the master or owners may discharge the goods into any depôt or at any convenient port or bring her cargo back to the port of shipment, "where the ship's responsibility shall cease," and "in any case the freight and charges to be paid in full and the shippers and the consignees to be responsible for all expenses thereby incurred upon the goods, and for demurrage and other expenses of the vessel to be paid in full along with the freight." Condition 9 is in these terms: "During conditions of war or hostilities existing or threatened, shipment is accepted at the sole risk of the cargo owners of arrest, restraint, capture, seizure, detention or interference of any sort by any Power; and the carrier and its representatives are privileged in its or their absolute discretion, if deemed advisable for the protection of the vessel or any cargo, or to avoid loss, damage, delay, expense or other disadvantage or danger, either with or without proceeding to or toward the port of discharge or entering or attempting to enter or discharge the goods there, and whether such entry or discharge be permitted or not, to proceed to any other port or ports or return to the port of shipment, once or oftener in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at any such port or ports at the first or any subsequent call, and full bill of lading freight, together with extra compensation for additional transportation and all other charges shall be paid by shipper, consignee and/or assigns, and shall be a lien on the goods."

Dealing first with the claim of the owners for additional payments chargeable upon the goods under the bill of lading, the events provided for by condition 8 are to be examined. How do the facts stand? The vessel was not prevented from reaching her destination. The goods were discharged, but not in the exercise of any power of choice reserved to the master or owners. It was said, however, that a liability is imposed on the cargo owners by the words, "In any

1919

THE DOMALD.

The President.

case, the shippers and consignees to be responsible for all expenses thereby incurred upon the goods." I do not take this view of the effect of this condition. The words "in any case" appear to me to relate only to the specified cases of discharge otherwise than at the named destination. I therefore hold that no valid claim is made out under condition 8. Under condition 9 it appears to me that the cargo owners accepted risks of loss by war conditions in the sense that they relieved the shipowners from those risks. But the shipowners did none of the things in respect of which under that condition expenses of additional transportation and of discharge are imposed on the goods owners. Condition 9, therefore, gives no claim to the shipowners in respect of the matters in question.

Much of the argument for the shipowners was addressed to the proposition that, in the exercise of the wide jurisdiction the Court has over captors and claimants in prize, I ought to award against the interest of the consignors and owners of goods such a sum as would fairly reimburse the shipowners for the loss caused to them by detention, deviation and unlivery. The argument was based on two main grounds. First, it was said the loss was plainly attributable to a taint in the goods, and reliance was placed upon the principle as to warranty enunciated in the judgment of Atkin J. in *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) Secondly, it was said that at any rate the shipowners were in no way to blame for the incidents which caused the loss they suffered, and as between them and the owners of the goods, the latter ought to be charged with this burden. In a case of like facts with *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) I should be ready to follow that decision. The warranty implied under *Mitchell, Cotts & Co.* v. *Steel Bros. & Co.* (1) is that a shipper will not ship goods likely to involve unusual danger or delay to the ship without communicating to the shipowner material facts which are within his knowledge, and not within the knowledge of the shipowner. But I am quite unable to say upon the facts before me that the cargo owners here concealed

(1) [1916] 2 K. B. 610.

1919

THE DOMALD.

The President.

from the shipowners any facts material to the enterprise which they ought to have disclosed. Both parties knew the risks, and the shipowners framed ingenious clauses to protect themselves against them. Further, I see nothing in the facts which ought to lead me to the conclusion that the cargo owners did anything before or at the shipment or during the voyage which increased the risk of the voyage. No facts were proved which enable me to say which of the alternative causes of detention alleged in the particulars of claim was in truth the cause, or, indeed, whether any of these allegations is correct. The goods were detained and unladen, but were not condemned. They were detained and unladen in the exercise of belligerent rights, presumably because the captors reasonably supposed them to be enemy goods or goods of enemy destination. That was a risk of sea transit in time of war, and not, so far as is shown, a mischief due to any act of the shippers. I am therefore of opinion, as a matter of principle, that the cost of this incident of belligerency cannot be charged upon the cargo shipped by the respondents to this claim.

Questions closely allied to those in this case were considered by Lord Sterndale P. in *The Rio de Janeiro* (1) and in *The Heim.* (2) In the former case Lord Sterndale expressed an opinion that in circumstances like these now under consideration "no claim could be made" against the cargo owners "because the cargo owner had done no wrong." This opinion, it was said, no doubt truly, was not a ground of the decision. In *The Heim* (2) goods were detained under the Reprisals Order of March 11, 1915. Lord Sterndale rejected a claim against the cargo in respect of the ship's detention during unlivery. But, applying the rule in *The Stigstad* (3) as to the award against the goods of "a proper recompense" to the shipowner "for carrying and discharging the cargo under the actual circumstances of the service," he pointed out that expenses which the shipowner has incurred in this service must be taken into account. Lord Sterndale used

(1) [1919] P. 242 *n.* (2) [1919] P. 237, 241.
(3) [1919] A. C. 279.

these words in *The Heim* (1): "If there have been thrown upon the shipowner expenses, for instance, which would otherwise have been thrown upon the cargo owner, they must be paid by the cargo owner when he gets his cargo, because he is relieved of expenses which he would otherwise have had to pay."

I was informed by Mr. Trehern, as amicus curiæ, that in the assessment in the Registry of "recompense" to the shipowners in *The Heim* (1) the amount of the bill of lading freight was raised by an allowance for expenses, although the voyage was never completed, and I do not think this impossible in point of principle. But the expenses which are referred to by Lord Sterndale are, as I understand, expenses which, under the contract of affreightment, would have been expenses of the cargo owner. The outlay sought to be recovered in this case is not outlay upon expenses of that class. It is an outlay not attributable to any contractual obligation between the shipowner and the cargo owner, but attributable only to the exercise of belligerent rights in relation to both of them. The case resembles closely one of the sets of claims which were adjudicated upon by Lord Sterndale in *The Einar Jarl.* (2) Claims similar to these made here were raised by shipowner against cargo owner, and were disallowed. In discussing them Lord Sterndale said: "I can see no reason whatever why, where you have two innocent persons, as you have in this case, neither of whom has done anything which is a breach of contract, but who have been prevented from performing it by the act of a belligerent, and loss has been occasioned to one of these parties, I should transfer that loss from the shoulders of one innocent party to the shoulders of the other." The principle so stated is that which I adopt in the decision of the present case. It was contended that neither of the judgments to which I have referred dealt specifically with the question of additional expenses which is here raised. I think the decision in *The Einar Jarl* (2) is directly in point, and that the same principle underlies all the cases.

(1) [1919] P. 237, 241. (2) Note post, p. 64.

1919

THE DOMALD.

The President.

On the various grounds which I have stated I accordingly disallow this claim.

Solicitors for the shipowners : *Stokes & Stokes.*

Solicitor for the cargo owners : *Albert M. Oppenheimer.*

---

(1) NOTE.—THE EINAR JARL. In this case the owners of the Norwegian steamship *Einar Jarl* claimed, in addition to the bill of lading freight, remuneration for the use of the ship for twenty-eight days during which she was detained in consequence of the seizure of her cargo of cotton-seed cake. The cargo was subsequently released. The claim was made against the cargo owners and alternatively against the Procurator-General.

LORD STERNDALE P. in giving judgment on October 28, 1919, said that the shipowners claimed to be paid the amount of their claim by the owners or receivers of the cargo as remuneration for the carriage and delivery of the cargo or as damages for breach of charter and of contract and duty in shipping cargo which was contraband or was such as to give rise to seizure and the detention of the ship. It was found that the cargo had no contraband destination, and it was therefore released. No case was made against the shipowner, and by the release of the cargo he thought it was shown that the cargo owners also were innocent. Both parties therefore were innocent of any contraband intention, and neither of them was to blame for the act of a third party—namely, the British Government—in exercising its belligerent rights. The shipowner was prevented from carrying out his contract, and the cargo owners were prevented from getting their cargo in accordance with the contract. In consequence the vessel was detained. "The question that I have to decide in these circumstances," continued his Lordship, "is what is the shipowner entitled to from the cargo owners? With the exception of one point there is no dispute. The shipowner is not entitled, of course, to his bill of lading freight as such, because he has not delivered the goods, and therefore, as bill of lading freight, he is not entitled to it. But he is entitled to remuneration for the services which he has rendered to the cargo of which the owners have taken possession. This matter has been under the consideration of the Court on more than one occasion, and I have the guidance of the Privy Council in *The Stigstad* as to what the shipowner is entitled to. I cited a passage from *The Stigstad* in *The Heim*. The Privy Council said that the shipowner was entitled to a sum which took into account "the actual course and duration of the voyage," and constitutes "a proper recompense alike for carrying and for discharging the cargo under the actual circumstances of that service." In considering that passage the opinion to which I came in *The Heim* was this. "And, if there have been thrown upon the shipowner expenses, for instance, which would otherwise have been thrown upon the cargo owner, they must be paid by the cargo owner when he gets his cargo, because he is getting relieved of expenses which he would otherwise have had to pay." That is not disputed by the cargo owners. The only question is whether the shipowner is entitled to the 2900*l.* which he claims, or to anything, in respect of the twenty-nine days' detention. That has been called all sorts of things—"remuneration," "payment for the extra use of the ship"—but it really

1919

THE DOMALD.

is nothing else but damages for detention. It is a claim that by breach of the charter or of the contract contained in the charter, the charterers retained the use of the ship longer than they were entitled to do, for twenty-nine days. I am still of the opinion which I expressed in *The Heim*, that in the circumstances such damages for detention are not recoverable either from the cargo owners or out of the proceeds of the cargo. [His Lordship quoted his observations in *The Heim*, and continued:] I still remain of the same opinion. I can see no reason whatever in principle why, where there are two innocent persons, the cargo owners and the shipowners, neither of whom have done anything which is in breach of their contract, but who have been prevented from performing it by the act of a belligerent, and loss has been occasioned thereby, the loss should be transferred from the shoulders of one innocent party to the shoulders of the other. Counsel for the shipowners, in reply, argued that the cargo owners had done something to cause suspicion against the cargo, and had, therefore, been the cause of the seizure. I do not think they did anything that can render them liable to anybody. The fact was that the Crown thought the circumstances suspicious, and therefore arrested the cargo, but nothing was done by the cargo owners which was wrong from a contraband point of view, and in the result the goods were released. I think therefore that the claim against the cargo owners fails. [His Lordship then dealt with the alternative claim against the Crown, as to which he held that the Crown were justified in seizing the cargo, as the evidence showed that there were persons who were Germans interested in the cargo, and there was no undue delay in releasing it after it was ascertained that it had not in fact an enemy destination.]

E. C. T.

[DIVORCE.]

QUINN *v.* QUINN.

Dec. 17.

Practice—Minor Respondent—Appointment of Guardian—Duty of Petitioner to procure Appointment—Service on Minor—Costs.

Where the respondent is a minor it is not necessary for the petitioner to see that a guardian ad litem has been appointed. Service on a respondent who has no such guardian is good if effected in the presence of his natural guardians.

Semble it would be good without their presence.

THIS was a wife's petition for divorce from her husband on the ground of his incestuous adultery with her half-sister.

The parties were married on August 23, 1917. The husband was then a minor of 17, but the wife was ignorant of this fact, the husband having represented that he was twenty-one,

1919

QUINN v. QUINN.

and that age was given in the certificate of marriage. The husband was a private soldier in a training camp in England; he was sent to France in March, 1918, but he and his wife lived together on several occasions when he had leave, both before and after he went to France, at the houses of her father and half-sister. He was demobilized on April 26, 1919, and lived for a few days with the petitioner at her father's house. The petition was presented in July, 1919, when the husband was still a minor of 19. It was served upon him in the presence of his father and stepmother. No guardian ad litem had been appointed.

The adultery was proved.

Cotes-Preedy for the petition. A question has been suggested whether a guardian ad litem ought to have been appointed and the petition served upon the guardian, and whether a minor can be made liable for costs. The Divorce Rules 105 to 108 give to any minor over the age of seven years power to elect a guardian, but there is nothing in these rules to make it necessary to appoint a guardian, and certainly nothing to throw on the petitioner the duty of procuring such an appointment. Rule 108 gives a minor power to defend without a guardian. And r. 10, which deals with service, makes no special provision for service on minors through a guardian.

Rayden (Divorce Practice, p. 113) says that service on a minor is good, citing *Brown* v. *Wildman*. (1)

As to costs a minor was ordered to pay costs in *Brockelbank* v. *Brockelbank*. (2)

THE PRESIDENT (SIR HENRY DUKE) This is a wife's petition for divorce on the ground of the incestuous adultery of her husband. The husband was at the date of the petition and still is a minor, and questions have arisen whether he was properly made a party and served. In *Cooper* v. *Green* (3) it is laid down that service on a minor in Probate cases should be made in the presence of "the natural or legal guardians of

(1) (1859) 28 L. J. (P. & M.) 54. (2) (1911) 27 Times L. R. 569.
(3) (1825) 2 Add. Ecc. 454.

1919

QUINN v. QUINN.

The President.

the minor; or, at least, in that of some person, or persons, upon whom the actual care and custody of the minor, for the time being, had properly devolved." That was a Probate case, and no doubt some colour is given by the Divorce Rule 10 to the view that those precautions are not necessary in matrimonial suits. But even if that view is wrong, in this case service was made in the presence of the minor's father and stepmother; and though he was past the age of nurture and not dependent on them, they were clearly his natural guardians. In my opinion the service was good.

As to costs; as a minor is legally competent to marry, condemnation in costs must be considered one of the possible consequences of the marriage which he has been allowed to contract. There must be a decree nisi with costs against the respondent and custody of the child.

Solicitors: *Peacock & Goddard, for Warner & Beswick, Hanley.*

J. R. B.

[DIVORCE.]

GOODMAN *v.* GOODMAN AND PINFIELD.

1920 *Jan.* 19.

Divorce—Practice—Evidence—Leave to give Evidence by Affidavit—Affidavit containing Allegations of Adultery.

There is no rule of practice that an affidavit, made in pursuance of leave to give evidence by affidavit, must not contain allegations of adultery. Affidavit evidence cannot without special leave be admitted as sole proof of adultery, though leave to use it even for that purpose may be given under very special circumstances. But a petitioner to whom leave has been given to give his evidence by affidavit should state in his affidavit all the facts in his knowledge which bear upon the case whether they prove adultery or not.

Gayer v. *Gayer* [1917] P. 64 explained.

This was a husband's petition for divorce on the ground of his wife's adultery. The petitioner had obtained leave to give his evidence at the hearing by affidavit. The order as drawn up gave leave "save all just exceptions," but did

1919

GOODMAN v. GOODMAN AND PINFIELD.

not expressly exclude evidence of adultery. The case was undefended. The affidavit sworn in pursuance of this leave contained (inter alia) allegations that the wife had confessed her adultery.

Tyndale for the petitioner. I propose in reading the affidavit to omit the passages relating to the wife's adultery, as they are inadmissible : see *Gayer* v. *Gayer*. (1)

McCARDIE J. I see no reason for omitting them. It is quite inexplicable to me why, when once leave has been granted that evidence may be given on affidavit, the affidavit should not contain statements dealing with the proof of adultery. It is one thing to say that adultery ought not to be proved on affidavit evidence alone, and quite another thing to say that no affidavit can contain an allegation tending to prove adultery. I shall hold that when a petitioner has been given leave to give his evidence on affidavit, he is entitled and, indeed, is bound to state in that affidavit all the facts within his knowledge which bear on the case whether they tend to prove adultery by the respondent or not. If I held otherwise, I should be giving sanction to an entirely undesirable practice which might lead to the suppression of facts which had an important bearing on the case. In many cases, for instance, the petitioner would be precluded from proving facts which went to the knowledge of the co-respondent that the respondent was a married woman, or from giving evidence of other vital circumstances. From the point of view of full disclosure, of obvious justice and of propriety, I hold without hesitation that a petitioner should not be excluded from stating in his affidavit all facts within his knowledge bearing on the case. I am not deciding that adultery may be proved by affidavit alone, but only that the petitioner is not precluded from giving evidence as to adultery in his affidavit.

I should add that there appears to me to have been a general and unfortunate misunderstanding of the effect of the decision in *Gayer* v. *Gayer*. (1) The effect of that decision is much

(1) [1917] P. 64.

1919

GOODMAN v. GOODMAN AND PINFIELD.

McCardie J.

more limited than has been supposed. The case does not lay down any rigid rule of practice. All that it decides is that it is not desirable, except in special circumstances, to rest proof of adultery on affidavit alone. It was clearly recognized by all the Lords Justices that in special circumstances adultery might be proved by affidavit alone.

The adultery was then proved by other evidence and a decree nisi pronounced.

Solicitor : *J. Carnegie, for A. J. Hatwell, Birmingham.*

J. R. B.

[DIVORCE.]

WILLIAMS *v.* WILLIAMS AND KILBURN.

1920

Jan. 19.

Dissolution of Marriage—Variation of Settlement—Guilty Wife's settled Property—Power of Wife to appoint to Husband and Children of future Marriage—Power limited to Husband and Children of Marriage subsequent to first Husband's Death—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

The Court has a discretion in making an order, under the Matrimonial Causes Act, 1859, s. 5, as to variation of a marriage settlement and disposition of property settled by the wife. Where a guilty wife had married the co-respondent during the life of her husband, the petitioner, the Court extinguished a power, given to her by the settlement, of appointing interests to the husband and children of any subsequent marriage, except a marriage contracted after the death of the petitioner. *Noel* v. *Noel* (1885) 10 P. D. 179 discussed.

In this case the husband had obtained a decree nisi for dissolution of the marriage on the ground of his wife's adultery with the co-respondent, on April 25, 1918, and the decree was made absolute on November 18, 1918. There were two children of the marriage, boys of ten and eight respectively, the custody of whom was given to the father. The wife had married the co-respondent after the decree absolute.

By an ante-nuptial settlement, dated April 26, 1916, funds brought in by the husband and wife respectively were settled

1920

WILLIAMS v. WILLIAMS AND KILBURN.

in trust in each case for the party bringing in the fund for life with remainder to the other party for life, and subject thereto in each case for the children of the marriage in such shares as the husband and wife jointly or the survivor should appoint, and in default of appointment for the children of the marriage equally. And the settlement contained a power for the survivor of the husband or wife upon or in contemplation of a subsequent marriage to withdraw from the settlement a certain proportion of the settled funds from the first settlement and settle the same upon such trusts as should be declared by the appointment in favour of a second wife or husband and the children or issue of a second marriage.

The husband presented a petition to vary the settlement; the matter was referred to the registrar, who reported that the trusts of the settlement should be varied (1.) by extinguishing all the rights, powers and interests of the respondent in and over the husband's trust funds; (2.) by extinguishing the respondent's power of appointment of the wife's trust funds amongst the children or remoter issue of the first marriage; (3.) by extinguishing the power of appointing any part of the wife's trust funds in favour of a second husband in the event of her surviving the petitioner so far as it gives a power of appointment in favour of any husband whom she might marry in the petitioner's lifetime or any children of such a marriage.

J. H. Murphy for the petitioner now moved to confirm the registrar's report.

Bayford K.C. for the trustees of the settlement. The respondent's power of appointment after her first husband's death ought not to be interfered with. The true rule is laid down by Sir James Hannen in *Noel* v. *Noel* (1): "As regards the children of a second marriage, supposing she marries during the lifetime of the petitioner, she must have the power of appointing in favour of children born after the death of the petitioner."

W. O. Willis for the respondent. I adopt the argument for

(1) 10 P. D. 179, 182.

1920

WILLIAMS v. WILLIAMS AND KILBURN.

the trustees. The report goes against Sir James Hannen's judgment in *Noel* v. *Noel* (1), which has been followed in all subsequent cases.

J. H. Murphy. If the report is varied it should at least exclude all the children of the co-respondent.

THE PRESIDENT (SIR HENRY DUKE): I have a discretion in the matter. Further, I do not think that children born to the respondent, but not of the marriage, are entitled to share in the fund. I do not think they come within the class contemplated by the settlement. I confirm the report, with the variation that the respondent may retain her power of appointment for her children by any marriage contracted after the petitioner's death.

Solicitors for petitioner : *Charles Russell & Co.*

Solicitors for respondent and trustees : *Burton, Yeates & Hart.*

J. R. B.

[DIVORCE.]

COLEMAN *v.* COLEMAN AND SIMPSON.

1920

Feb. 9.

Divorce—Practice—Wife's Costs—Husband's Petition—Order for Payment into Court—Death of Husband before Order obeyed—Liability of his Executors—Jurisdiction of Divorce Court to enforce Order.

Where in a suit brought by a husband for divorce an order has been made that the husband shall pay his wife's taxed costs and pay into Court, or give security for money towards her future costs, and the husband dies before the order has been obeyed, the Court has no jurisdiction to enforce payment against his executors. In such a case the suit is at an end and there is nothing in the Divorce Act or in the practice of the Court to enable it to be revived or the petitioner's executors to be brought before the Court.

THIS was a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The respondent and co-respondent both put in defences.

(1) 10 P. D. 179.

1920

COLEMAN v. COLEMAN AND SIMPSON.

On March 6, 1919, an order was made that the petitioner should within seven days from service of the order pay to the respondent's solicitors her taxed costs to date, and pay into Court, or give security for 50*l.*, her estimated costs up to the hearing. This order was served on Monday, March 11, 1919. On March 17 the petitioner's solicitors informed the respondent's solicitors that they had on the Saturday before received a cheque from their client, and would send their own cheque for the taxed costs, and the respondent's solicitors might treat the 50*l.* as already paid in. On March 18, the case was in the paper for hearing but was not reached. On March 19 it was again in the paper, but it was announced that the petitioner had committed suicide in the night and the case stood out as abated.

It appeared that by some oversight the cheque sent by the petitioner to his solicitors had not been cashed before his death, and having no funds in hand they refused to pay the respondent's costs. On March 24 the matter was again mentioned to the Court, and Shearman J. refused to make any order, but gave the respondent liberty to apply after the will had been proved. The will was proved on June 25, 1919. On February 2, 1920, the respondent took out a summons to which the executors were made defendants, asking for taxation of her costs and payment out of the petitioner's estate. The summons was adjourned into Court and now came on for hearing before the President.

Grazebrook for the summons. The case was allowed to go on by the respondent, when she was in a position to have the proceedings stayed until the money was paid into Court, in reliance on the undertaking given by the petitioner's solicitors that the respondent's solicitors might treat the money as paid in. The sudden death of the petitioner cannot relieve him or his estate from the consequences of that undertaking. The case is governed by *Cunningham* v. *Cunningham*. (1)

A. S. Poyser for the executors. The executors are not

(1) (1897) 77 L. T. 405.

and cannot be made parties to the suit, and the Court has no jurisdiction to make any order against them. The suit was abated by the death of the petitioner, and there is no power to revive it against the executors. The judgment of Farwell L.J. in *Brydges* v. *Brydges and Wood* (1) is conclusive against the application. In *Cunningham* v. *Cunningham* (2) there was money in Court, the Court had jurisdiction over the money and the order made was limited to the money in Court. In *Maconochie* v. *Maconochie* (3) it was again held that there was no jurisdiction to make any order against the petitioner's executors, and the distinction from *Cunningham* v. *Cunningham* (2) was pointed out by Shearman J.

Grazebrooke in reply.

In the course of the argument the President asked whether the respondent's counsel wished to amend the summons in order to proceed against the petitioner's solicitors as officers of the Court; but counsel said he preferred to proceed on the summons as it stood.

THE PRESIDENT (SIR HENRY DUKE). This case raises a new question whether an order calling upon a husband to pay and give security for his wife's costs of a suit which he is bringing against her, requires, as a condition precedent to enforcement in case of his death, that the costs must be paid and the security completed before the proceedings are abated by his death. It is said that there was a good defence in the present case; but I think that is immaterial, as also is the fact that in this case the executors of the deceased husband have taken an unusual decision. It is a decision depending upon matters which are not in evidence and it is to be regretted that in one aspect of the case the dilemma in which the wife finds herself arises from the confidence entertained by her solicitors in what passed between them and her husband's solicitors. The wife's adultery was denied and she raised countercharges which

(1) [1909] P. 187, 190. (2) (1897) 77 L. T. 405.
(3) [1916] P. 326.

1920

COLEMAN v. COLEMAN AND SIMPSON.

if established would amount to a statutory defence. The customary application was made that her husband make provision for her costs, and an order was made that he should pay 18*l.* for her taxed costs and lodge 50*l.* in Court for her costs of the trial. Without such an order the wife would be left, in proceeding with her defence, to rely upon such advantages as the common law gives her in respect of what are called necessaries, apart from the jurisdiction of this Court. That jurisdiction gives her the advantage of being able, if her husband fails to pay or secure her costs, to stay the proceedings in his suit. [His Lordship stated the facts as above and continued:] At the time of the husband's death there was not actually in existence any fund for payment of the wife's costs or any security for them, and although the wife had obtained her order she was in no better position than if the time for complying with it had not elapsed, because the course adopted had practically extended the time for compliance. It is urged that the case of *Cunningham* v. *Cunningham* (1) is an authority by analogy for enforcing the order after the death of the husband. But in that case the money was in Court, and therefore the Court had jurisdiction over it, as in rem. There is no money in Court in this case, and the observations apply which were made by Shearman J. in the similar case of *Maconochie* v. *Maconochie* (2); and there is nothing in that case to imply that the wife would have been in any better position after the death of her husband, the petitioner, by reason merely of her having obtained an order in his lifetime.

Counsel for the executors of the husband cited *Brydges* v. *Brydges and Wood.* (3) The observations of Farwell L.J. there were made in a case not entirely analogous to this one, because there the contest was between petitioner and co-respondent; but he laid down the principle that the Court has no jurisdiction in a suit for divorce and between the parties, beyond the pendency of the suit. In this case

(1) 77 L. T. 405. (2) [1916] P. 326.
(3) [1909] P. 187, 190.

1920

COLEMAN v. COLEMAN AND SIMPSON.

The President.

at the time when there was a suit the executors were not parties to it. The jurisdiction is wholly statutory, and there is no jurisdiction, merely by reason of the presence before the Court of the respondent, to exercise any power over the executors of the petitioner who are not and were not parties. Apart from any question of an undertaking this Court does not deal with promises to pay. I am aware that it is said that there was in this case reliance upon a promise by the solicitors. And I invited counsel to consider whether it was desirable to make any application in respect of their undertaking; but, no doubt for good reasons, he declined to do so. In its present form the application fails and must be dismissed with costs.

Solicitors for summons: *Lambert & Hale.*
Solicitors for executors: *Torr & Co.*

J. R. B.

[DIVORCE.]

BEST *v.* BEST AND McKINLEY.

1920
Feb. 2.

Divorce—Practice—Proof of Birth of Child—Certified Copy of Register—Evidence of Handwriting of Informant in original Register—Right of Public to inspect Register—Births and Deaths Registration Acts, 1836 (6 *&* 7 *Will.* 4, *c.* 86), *s.* 35; 1874 (37 *&* 38 *Vict. c.* 88), *s.* 44.

The fact that the respondent to a petition for divorce has given birth to a child may be proved by production of a certified copy of the register, with evidence that the signature of the informant in the original register is in the handwriting of the respondent.

The Births and Deaths Registration Act, 1836, s. 35, gives the public an absolute right to search the register at reasonable times; and this right cannot be taken away by the power given to the Registrar-General to make regulations as to the search by s. 44 of the Act of 1874.

THIS was a husband's petition for dissolution of his marriage on the ground of his wife's adultery. She had given birth to a child of which the petitioner, owing to his absence in France on active service, could not have been the father. It was intended to prove the birth by production of a certified

1920

BEST v. BEST AND MCKINLEY.

copy of the register of births, and the husband's identification of his wife's signature of the register as informant; but the officials at St. Albans had refused to allow the petitioner to inspect the register. The petitioner, who was suing as a poor person, was obliged to subpœna the Superintendent Registrar at St. Albans and bring him before the Court at considerable expense to produce the original register.

The Superintendent Registrar produced the original register, and the husband identified his wife's signature thereof. The Superintendent Registrar stated that he had refused the petitioner's application to search the register in obedience to certain regulations issued by the Registrar-General, which stated that the public, on paying the statutory fee, were only entitled to search the indexes to the register, and not the register itself. These regulations were issued under s. 44 of the Act of 1874.

Tyndale for the petitioner.

MCCARDIE J. I grant a decree nisi in this case. It raises incidentally a point of great importance to the public. The respondent gave birth to a child, of which the petitioner could not have been the father, and registered its birth. The principle which I indicated in *Brierley* v. *Brierley and Williams* (1), that the birth of a child may be proved by producing a certified copy of the register of its birth, with evidence identifying the respondent's signature as informant in the register, becomes applicable, and it was important that the petitioner should be able to prove that the informant's signature was that of his wife. Petitioners have constantly been allowed to inspect the original register and to prove the material signature in the box without producing the original, producing of course a certified copy, and the practice has been of great utility to poor people. In the present case inspection of the original register was refused to the petitioner, with the result that he has been put to the expense of calling as a witness a gentleman from the

(1) [1918] P. 257.

Registrar's Office at St. Albans, who has produced the original register in Court. I always regard with doubt the refusal of an official to produce a public register to a person vitally interested. In this case inspection was in my opinion wrongly refused. There are two relevant statutes, the Births and Deaths Registration Acts of 1836 and 1874. By s. 35 of the first Act it is expressly enacted that persons keeping any register books shall at all reasonable times allow search of such books, and give certified copies on payment of fees. These are clear, wide and emphatic directions, and the right thereby given to the public was recognized in *Steele* v. *Williams* (1), though it was said to be the duty of the parish clerk (the official in that case) to "superintend the search, and keep control of the book." Subject to proper control and the precautions suggested by common sense, inspection was to be allowed. Sect. 37 deals with indexes, but the rights given by it are clearly additional.

The official witness in this case suggests that the public are entitled to see only the indexes, and refers me to s. 44 of the Act of 1874. I have considered that section, and the departmental regulations purporting to have been made under it. In my opinion that section gives the Registrar-General no right to cut down the privileges conferred on the public by s. 35 of the earlier Act. It may possibly give a power to frame appropriate regulations controlling the procedure of search, but a power to regulate the exercise of a right does not entitle an official on whom it is conferred to destroy the right which he purports to regulate. That could only be effected by a statutory provision as clear and forcible as that which conferred the right. Inspection was erroneously refused, and I trust that what I have said will have the effect of preventing the recurrence of such refusal.

Solicitors : *Milner & Bickford, for Thomas D. Shaw, Morpeth.*

(1) (1853) 22 L. J. (Ex.) 225.

J. R. B.

1920
Jan. 16.

[ADMIRALTY.]

THE CHARLOTTE.

Admiralty—Practice—Collision—Bail—Statutory Limit of Liability—Right to Limit disputed—Amount of Bail.

If, in an action of damage by collision, the amount for which the action is brought exceeds the statutory limit provided by s. 503 of the Merchant Shipping Act, 1894, the defendant shipowners on filing an affidavit in the damage action stating the tonnage of their ship and that the collision happened without their actual fault or privity, will, if these facts are not denied by the plaintiff shipowners, be entitled to have the ship released on bail being given to an amount sufficient to cover the statutory limit, together with interest and costs. But if the plaintiffs dispute the facts on which the right to limit liability depend, bail must be given to the full value of the defendants' ship.

Motion on behalf of the owners of the British steamship *Theory*, and others, the plaintiffs in an action of collision, to set aside a caveat against arrest and to obtain leave to arrest the French steamship *Charlotte*, belonging to the defendants.

On the night of December 18, 1919, there was a collision in the Bristol Channel between the *Theory* and a vessel alleged to have been the *Charlotte*. The *Theory* was sunk, and her crew of twelve were drowned. While the *Charlotte* was under repair at Cardiff, as the solicitors acting on behalf of her owners had not received instructions to put in bail to answer the claim of the owners of the *Theory* and the personal representatives and dependants of the master and crew, they gave an undertaking that the *Charlotte* should not leave the jurisdiction without forty-eight hours' notice. Afterwards, having received the necessary instructions, they completed bail for 13,000*l.*, the full amount of the owners' statutory liability (15*l.* a ton) under s. 503 of the Merchant Shipping Act, 1894. The plaintiffs, however, claimed bail for the full market value of the *Charlotte*, estimated at 63,000*l.*, and filed an affidavit in support of the application in which they alleged that the vessel had been surveyed and there was a question whether her lights were not defective, and

1920

THE CHARLOTTE.

that the defect existed at the commencement of the voyage; and that it might turn out, therefore, that there had been fault or privity on the part of the owners of the *Charlotte* which would disentitle them to limit their liability. The defendants on January 8, 1920, entered a caveat against the arrest of their vessel, and the present motion was brought to set aside that caveat.

Balloch for the plaintiffs. The collision took place at night, and the question of lights is therefore of great importance. If it should turn out that there were defects in the *Charlotte's* lights which were in existence when the voyage began, the owners might be held responsible, and in that event they would not be liable to limit their liability, as the collision would not have taken place without their "actual fault or privity." The plaintiffs are therefore entitled to arrest the *Charlotte*, notwithstanding the deposit of the statutory amount of bail, in order to obtain bail to the full value of the ship, which is estimated at 63,000*l.* The plaintiffs' claim amounts to 80,000*l.*

Noad for the defendants. Bail having been furnished to the full amount of the defendants' statutory liability, there is no obligation to do more. No evidence has been adduced by the plaintiffs to show that the defendants were aware of the alleged defective condition of the lights.

HILL J. I think an order must be made setting aside the caveat and giving leave to the plaintiffs to arrest the *Charlotte*, with liberty to the defendants to apply with respect to the bail already given.

In my opinion the practice is correctly stated in note (*p*) on pp. 291 and 292 of Williams and Bruce's Admiralty Practice, as follows: "If the amount for which a cause of damage is instituted exceeds the statutory limit, the defendant, on filing an affidavit in the damage suit, stating the tonnage of his ship, and that the collision happened without the actual fault or privity of any of the owners, will, if these facts are not denied by the plaintiff, be entitled to have the ship released

1920

THE CHARLOTTE.

Hill J.

on bail being given to an amount sufficient to cover the amount of the statutory limit, and interest and costs. Of course, the plaintiff may dispute the facts on which the defendant's right to avail himself of the benefit of the provisions of the statute rests, and then bail must be given to the full value of the property."

The defendants allege that the facts will turn out to be such that they will be entitled to limit their liability. That issue is one which cannot be tried on the present application, and can only be decided when the action is tried. The plaintiffs, therefore, who have never assented to the limitation of bail, had the right to demand bail to the full value of the ship. Of course, they do this entirely at their own risk, and if it turns out that they have made an exorbitant demand for bail they may suffer for it hereafter. All questions of the costs of providing bail and the costs of this application are reserved.

Solicitors for plaintiffs : *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for defendants : *W. A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

E. C. T.

(IN PRIZE.)

THE VALERIA.

[1918. No. 1903.]

1919
Dec. 10, 11
1920
Jan. 14.

Prize Court—Capture of Enemy Vessel in Neutral Territorial Waters—Capture made in Good Faith—Subsequent Loss of a Vessel—Absence of Negligence—Claim by Neutral Government—Restitution in Value—XIIIth Hague Convention, art. 3.

A German vessel was captured by a British armed trawler within Norwegian territorial waters. The capture was made in the bona fide belief that the vessel was outside the three mile limit of territorial waters. In bringing the prize back to a British port it became necessary to abandon her owing to bad weather, and she was accordingly sunk by gunfire. The Norwegian Government claimed the restitution of her value, damages, and costs.

Held, that although the vessel would have had to be restored to the claimants had she been afloat, inasmuch as the capture was made in good faith the claimants were merely entitled to a decree that the capture was made in territorial waters and not to an order for restitution in value or for damages or costs.

Claim by the Norwegian Government for the restitution in value of the German steamship *Valeria*, and for damages and costs, on the ground that she had been captured in Norwegian territorial waters.

On March 21, 1918, the German steamship *Valeria* was captured by His Majesty's armed trawler *Glendale*, which was patrolling in the Vest Fjord, off the coast of Norway. The Crown claimed the condemnation of the *Valeria* and her cargo and adduced evidence to the effect that she was captured about 50 yards outside the territorial limit. The Norwegian Government filed a claim for the restitution of the vessel and for damages and costs on the ground that the capture was within the three mile limit of territorial waters. It appeared that after the capture bad weather was encountered, and, in crossing the North Sea, the commander of the *Glendale* was compelled to abandon the *Valeria*, and he therefore sank her by gunfire.

The case came before the late President, Lord Sterndale,

1919

THE VALERIA.

on July 3, 1919, and succeeding days. His Lordship delivered a judgment on July 17 in which he found that the capture took place within territorial waters, but that the officers on board the *Glendale* had no intention of violating Norwegian neutrality and bona fide believed that they were outside the limits of territorial waters. He reserved the questions of restitution in value and of damages and costs for further argument.

Dec. 10. *Butler Aspinall K.C.* and *Balloch* for the claimants. The Norwegian Government are entitled to have the vessel handed back to them, and therefore, as she has been lost, to her restitution in value. When the seizure was justifiable and the vessel is subsequently lost restitution in value is not decreed: *The Maria and Vrow Johanna* (1), *The Der Mohr* (2); but in this case the act of seizure constituted an unneutral act, and the captors are in the position of trespassers and subject to a continuing liability to restore the vessel or her value; the fact that she has been lost without negligence is immaterial: see *The Anna.* (3) The law is clearly formulated in art. 3 of the XIIIth Hague Convention that when a ship has been captured in the territorial waters of a neutral Power "the captor Government, on the demand of that neutral Power, must liberate the prize with its officers and crew": see for recent examples: *The Düsseldorf* (4) and *The Bangor.* (5) [Reference was also made to *The Twee Gebroeders* (6) and *The Purissima Conception* (7) and to Westlake's International Law, Part II., pp. 227–229, and Wheaton's International Law (Dana's ed.), pp. 654–656.]

C. R. Dunlop K.C. (*Sir Gordon Hewart A.-G.* with him) for the Procurator-General. The Court having found that the capture within territorial waters was due to an honest mistake in fixing the position of the *Valeria* no damages are recoverable, and if the vessel had still been afloat the decree would merely have been for restitution: *The Düssel-*

(1) (1803) 4 C. Rob. 348.
(2) (1802) 4 C. Rob. 314.
(3) (1805) 5 C. Rob. 373.
(4) [1919] P. 245.
(5) [1916] P. 181.
(6) (1800) 3 C. Rob. 162.
(7) (1805) 6 C. Rob. 45.

dorf (1) *The Twee Gebroeders.*(2) If the Norwegian Government had not intervened, the capture, as against the enemy, would have been upheld although made in territorial waters : *The Bangor* (3). Similarly in the case of a neutral ship, if there was probable ground for the seizure, there would merely have been a decree for restitution without costs or damages if it transpired that the seizure, although made in good faith, was within neutral territorial waters : *The Betsey* (4), *The Maria and Vrow Johanna.* (5)

[THE PRESIDENT : The distinction between the present case and *The Maria and Vrow Johanna* (5) is that in the latter the capture was lawful.]

In the present case the capture was valid against the German owner ; it is merely the rights of third parties that have been infringed. A capture which is valid against the owners is not void ab initio. In *The Anna* (6) the capture was wilfully made in flagrant breach of American neutrality, and even in that case, although Lord Stowell gave damages to compensate individual losses, it does not appear from the report whether the American Government obtained damages for violation of their sovereign rights. Where the seizure is bona fide a captor is not an insurer and is not liable to make restitution if the prize has been accidentally lost at sea, he is only liable if there has been negligence : *The Der Mohr* (7), *The John* (8) ; and to compel restitution in value is in effect to award damages. In order to ascertain whether the seizure is bona fide the Court should have regard to the honesty of the captors and not the actual legality of the capture. [Reference was also made to *The Catherine and Anna* (9) and Halleck's International Law, Vol. II. p. 416.]

Cur. adv. vult.

Jan. 14. The PRESIDENT (SIR HENRY DUKE) : This is the claim of the Consul-General for Norway on behalf of

(1) [1919] P. 245.
(2) 3 C. Rob. 162.
(3) [1916] P. 181.
(4) (1798) 1 C. Rob. 93.
(5) 4 C. Rob. 348.
(6) 5 C. Rob. 373.
(7) 4 C. Rob. 314.
(8) (1818) 2 Dods. 336.
(9) (1801) 4 C. Rob. 39.

1920

THE VALERIA.

The President.

H.M. The King of Norway for restitution in value of the German S.S. *Valeria* with damages and costs.

The *Valeria* was captured by an armed British trawler, the *Glendale*, on a voyage from Narvik in Norway to the port of Hamburg with a cargo of iron ore. In crossing the North Sea toward Lerwick the commander of the *Glendale* encountered bad weather, and he deemed it necessary to abandon and sink the *Valeria*. The ground of the present claim is that the capture of the *Valeria* was made within the territorial waters of Norway. Claims which were made on behalf of the German owners of the *Valeria* and of her cargo respectively have been struck out. A claim which was lodged on behalf of the Norwegian Customs Officers and pilots who were on board the *Valeria* when she was captured will, I believe, be disposed of by agreement.

At the hearing of the cause on July 17, 1919, upon the question of the locality of the capture, the President, Lord Sterndale, found that the place of capture was within the territorial waters of Norway, but found, further, that the violation of Norwegian neutrality was unintentional, and that the captor honestly and reasonably believed at the time that his vessel and the *Valeria* were outside of territorial waters. Upon these findings, judgment is claimed on behalf of the Norwegian Government for the value of the *Valeria* and her cargo and for damages and costs.

No allegation is made of misconduct or negligence on the part of the *Glendale* in the management of the *Valeria* after capture. The claim which is made is based upon the broad proposition that the captor was a wrongdoer and therefore held and dealt with the captured ship and cargo at his personal risk. The argument necessarily went the length also of maintaining that if and when liability should be established against the captor it must be made good by the British Crown. It is unnecessary to consider the questions which this contention might be found to involve, as counsel for the Procurator-General has consented that the proceedings should be deemed to have been amended by adding the commander of the *Glendale* as a party.

The rule of international law which is relied upon in support of the claim for restitution is that which was formulated at the Hague Conference in 1907 in Convention XIII., concerning the rights and duties of neutral powers in naval war. Article 3 of that Convention deals with the case of capture in neutral waters, and runs thus: "When a ship has been captured in the territorial waters of a neutral power, such power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew and to intern the prize crew. If the prize is not within the jurisdiction of the neutral power, the captor Government, on the demand of that neutral power, must liberate the prize with its officers and crew." *The Düsseldorf* (1), heard in this Court in May, 1919, is an instance in which effect was given at the instance of the Norwegian Government to the rule which is thus expressed. A German vessel which had been captured in Norwegian waters was there released upon the claim of H.M. the King of Norway by delivery in the port of Bergen, and, as was stated by counsel in the present case, upon the authority of the claimant, was forthwith handed over to the German owners. The rule which was illustrated by the decision in *The Düsseldorf* (1) is not of recent origin. Lord Stowell states it with much emphasis in *The Vrow Anna Catherina* (2): "When the fact [of capture in neutral waters] is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy." There are no exceptional circumstances in the case of the *Valeria* such as were considered in the American case of *The Anne* (3), and it was not disputed on the part of the Procurator-General that if the *Valeria* had still been afloat she must have been released at the suit of the present claimant, notwithstanding that no claims of her enemy owners could have been admitted. *The Bangor.*(4)

The question now—the release of the *Valeria* being

(1) [1919] P. 245.
(2) (1803) 5 C. Rob. 15, 16.
(3) (1818) 3 Wheat. 435.
(4) [1916] P. 181.

1920

THE VALERIA.

The President.

impossible—is "whether there is a rule of international law enforceable in this Court which requires that restitution of her value shall be made." Convention XIII. of the Hague Conference does not deal with the matter. Convention XII., which contemplated the establishment of the International Prize Court, contained provisions (in art. 7) which might have been relied upon in support of the claim if they had received the assent of the legislature of the United Kingdom. That assent, however, they never obtained. The principles which are to govern the decisions of the Court must be found, therefore, in the accepted authorities. Text-books and cases were relied upon on both sides. In the text-books the most precise statement is that contained in the passage in Hall's Treatise on International Law, 7th edition, at page 662, where the author states that "the redress which it is usual to enforce for a violation of neutral sovereignty consists in a replacement in its anterior condition, so far as may be possible, of anything affected by the wrongful act." Instances of recognition of such an obligation are found in the text-books: *see* Dana's Wheaton, 8th edition, pp. 526–528; Hall, 7th edition, pp. 662–663; but they are results of diplomatic arrangements, and not of judicial decision, and it is noteworthy that in various cases where vessels captured in violation of neutral sovereignty had been afterwards accidentally lost or destroyed, such an event appears to have been regarded in the diplomatic sphere as making an end of the matter between the neutral complainant and the belligerent power. Two cases in the English Prize Courts which throw some light upon the question of principle are those of *The Betsey* (1), and *The John* (2). The *Betsey* was a neutral ship carrying neutral cargo which was captured by a British warship off Guadaloupe under circumstances which made her capture unsustainable. The captor had erroneously supposed that Guadaloupe was under blockade, and that the *Betsey* had broken the blockade. She was lost to the captor by enemy recapture. In adjudicating upon a claim for restitution in value, Lord

(1) 1 C. Rob. 93, 98. (2) 2 Dods. 336, 339.

1920

THE VALERIA.

The President.

Stowell stated the test of a captor's liability under such circumstances in these terms : " What was the nature of the original seizure ; whether it was so wrongful, as to bring upon the seisor all the consequences of that strict responsibility, which attaches to a tortious and unjustifiable possession ? " and he rejected the claim. The *John* was an American vessel captured by a British warship in 1815 after peace had been concluded between this country and the United States, and in ignorance of that fact, and lost by the captor at sea without negligence. The owners' claim for restitution in value was held by Lord Stowell to be barred by the fact that the capture was made in g od faith. The decisive question was said to be—was there " bona fide possession " in the captor, i.e., possession which was " honestly taken under all the knowledge of rights which the party had or could have had upon due and practicable inquiry ? " Lord Stowell also said that in such a case " the very title of bona fide refers more to the integrity of the party than to the legality of the act," and added this : " he errs optima fide if he acts honestly, according to all the information he either had or could have procured." In *The Der Mohr* (1), Lord Stowell is also reported as saying that for "loss at sea by accident only in bringing in, a captor who has made a justifiable seizure would not be liable to make restitution " ; the epithet " justifiable " being applied to the seizure in question, notwithstanding that in the event the vessel seized was held not to be condemnable as Prize. The present claim for restitution was founded rather upon an assumed analogy to cases of tortious possession under English common law than upon any definite rule or precedent under international law. The case of the captor was likened to that of a man who by mistake possesses himself wrongfully of a chattel not his own, and loses it. Mr. Aspinall's illustration was that of a member of a club who inadvertently carries away the umbrella of another member. The analogy seems to me to fail in this, that the person supposedly guilty of such a conversion has no lawful authority or lawful

(1) 4 C. Rob. 317.

1920

THE VALERIA.

The President.

duty to take any chattel other than his own, and is answerable in damages if he does, whereas the commander of a belligerent warship has such an authority and duty, and is not liable in damages in a Prize Court if he discharges his duty or uses his authority in good faith. The cases show, I think, that a personal claim of any owner of the ship or cargo now in question against the captor would have been disposed of by Lord Sterndale's finding that the capture was made in good faith and without gross negligence. Can the unintended encroachment of the captor upon the territorial waters of a neutral power give to that power a claim on behalf of enemy owners which under international law neutral owners of a vessel seized in error would not possess ? In my opinion, it cannot, and I must pronounce against the claim for restitution in value.

With regard to the claim for damages, the infringement of Norwegian sovereignty is established, but this is not a wrong which gives a claim for pecuniary compensation cognisable in any court of law at present existing. Amends for such occurrences are not subject to judicial determination. The unintentional character of the offence has to be considered, therefore, in relation only to the claim which is set up for award of damages in respect of the arrest and detention —and, if any part of that question is still open, the loss— of the ship and cargo. So far as I am aware such damages have been awarded only where a capture was made in wilful abuse of belligerent rights. The leading case is *The Anna* (1), where, upon proof of the capture and oppressive detention in flagrant and deliberate breach of the neutrality of the United States of a ship and cargo claimed by United States citizens, Lord Stowell awarded damages and costs against the captor, the commander of a privateer, at the instance of the Government of the United States, the American Minister being the claimant. A case which is like the present in the absence of wilful misconduct is that of *The Twee Gebroeders.* (2) The ship there in question—a Dutch vessel—was captured in the Eastern branch of the Ems

(1) 5 C. Rob. 373. (2) 3 C. Rob. 162, 166.

while engaged in running the British blockade of the port of Amsterdam, then in enemy occupation. Claim for her release was made by the Government of Prussia on the ground that the boats which made the capture had been dispatched from a British vessel lying within the territorial waters of Prussia. The boundaries between Prussian and Dutch waters in the Eastern Ems were, it appeared, difficult of determination, and Lord Stowell, finding that the error which vitiated the capture was attributable to misapprehension or mistake, said "it is very different from a case of actual attack on clear neutral territory," and upon this ground ordered the release of the vessel without damages or costs. The findings of the Court upon the trial of the question of fact in the present case bring the case within the authority of the decision in *The Twee Gebroeders* (1) and no damages should be awarded in respect of the capture of the *Valeria*.

There remains the question of costs. Applying the principles stated in the judgment of the Privy Council in *The Zamora* (2), the Crown submits to pay such costs as may be awarded in the exercise of the discretion of the Court pursuant to the Prize Rules, 1914 (Order XVIII., r. 1). The Crown also accepts the liability for costs which under the established practice of the Court might, without the Rules of 1914, have been awarded against the captor. The principal facts in relation to the question are that the capture in violation of neutral rights was not made by order of a minister of the Crown, or intentionally or knowingly on the part of the captor; that the loss of the *Valeria* without negligence was known at all material times to the claimant; that the Procurator-General was in the wrong in his contention at the trial as to the question of locality of capture; and that the claimant is found by this judgment to be in the wrong as to the questions of restitution in value, and of damages.

The claimant is entitled to have it declared that the capture of the *Valeria* was made in Norwegian waters, and

(1) 3 C. Rob. 162, 166. (2) [1916] 2 A. C. 77.

1920

THE VALERIA.

The President.

I so declare; but, having regard to the general principles which govern liability for costs in Prize, and to the result of the litigation as a whole, I make this declaration without an award of costs to either party.

Solicitors for the claimants: *Waltons & Co.*
Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

1920

Feb. 18, 19.

[DIVORCE.]

LANGRICK *v.* LANGRICK AND FUNNELL.

Divorce — Practice — Damages — Costs — Knowledge of Co-respondent that Respondent is a married Woman—Measure of Damages.

There is no absolute rule of law that a husband who claims damages or costs against a co-respondent must prove that the co-respondent knew that the respondent was a married woman. The Court has power to give damages and costs if the circumstances show that the co-respondent ought to have known that fact.

THIS was a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The petitioner was a sergeant in the Army, and the co-respondent was a sub-lieutenant, who held, or had held, a commission in the same regiment.

Both the respondent and the co-respondent put in answers denying the adultery, but at the hearing the adultery was admitted; and the only contest was as to whether the co-respondent knew that the respondent was a married woman, and whether he knew that she was the wife of a non-commissioned officer in his own regiment, and his consequent liability for damages and costs.

Sir Patrick Rose-Innes K.C. and *J. H. Watts* for the petitioner. Though there is no direct evidence that the co-respondent knew that the respondent was a married woman, it is proved

that the respondent took him to her home where there were large photographs of herself as a bride standing beside her husband, and though she told him that the house was her sister's, there was at least enough to put him on inquiry. He cannot escape damages or costs by merely refusing to see what was obvious.

Le Bas for the co-respondent. The burden of proving that the co-respondent knew that the respondent was married is on the petitioner and he has not discharged it. He has produced no evidence on the point. The co-respondent cannot, therefore, be condemned in damages or costs.

W. O. Willis for the respondent.

Sir Patrick Rose-Innes K.C. in reply.

SIR HENRY DUKE P. The material questions in this case are those which affect the judgment I ought to give in respect of the claims of the petitioner for damages and costs.

The adultery of the respondent and co-respondent is beyond all question. It has been specifically admitted by both of them.

The contest in the case has been waged mainly by counsel for the co-respondent with a view to establishing two things in his favour: first, that he was not guilty of the very grave offence in a military man of seducing the wife of his military subordinate; and, secondly, that he was not guilty of adultery with knowledge that the person with whom he committed adultery was a married woman.

The allegation of knowledge, so far as it is immediately relevant to the issue in the case and is not a question of military conduct, affects both the claim for damages and the claim for costs. [His Lordship then said that he accepted absolutely the evidence of the co-respondent that he had no personal knowledge of the petitioner before the events which were in question in the case, and did not know that the respondent was the wife of a sergeant in the battalion in which he served, and continued:] I pass on to deal with the case as it invokes the jurisdiction of the Court in respect of damages and costs. It has often been said that the jurisdiction of the Court to award

1920

LANGRICK v. LANGRICK AND FUNNELL.

The President.

damages and the jurisdiction to award costs in suits such as this differ to some extent in their character and are not entirely governed by the same considerations. Persons who have looked merely at the exercise of the jurisdiction have formed the erroneous view that there is something capricious and irrational in the mode with which those questions of damages and costs in cases of adultery are disposed of by the Courts. There is nothing capricious or irrational. It may be worth while as the subject is being discussed, and as at the present time there are many cases in which, unhappily, damages for adultery have to be claimed, that I should express concisely what I believe to be the true view with regard to both these matters.

First of all, with regard to damages. The claim for damages in a suit founded upon adultery is a claim the right to which is established by the Divorce Act, 1857. It is established in place of a cause of action which existed at common law—namely, the cause of action of a married man for the criminal conversation of a defendant with his wife. That cause of action was taken away by the Divorce Act, and this claim for damages in a suit for divorce was deliberately substituted.

The grounds upon which the damages may be recovered are the old common law grounds upon which damages might be recovered for criminal conversation. The ground of damages there was that the plaintiff had certain lawful rights and that the defendant had infringed them, whereby the plaintiff had suffered damage; and when those necessary allegations were established, the plaintiff was entitled to a verdict for damages, which might be a verdict of one farthing, or might be a verdict, as sometimes happened in such cases, for a very large sum; but upon obtaining his verdict he recovered such costs as the general law with regard to costs gave him in an action at common law. He may still recover a sum of money for the wrong which is measured by the same process by which it was measured at law before the Divorce Act.

With regard to costs, his claim is no longer subject to the statutory or other rules of the common law which regulated costs in the action for criminal conversation. His right to

recover costs is founded upon s. 34 of the Divorce Act, 1857, which directs generally that: "Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings"; and there is a general rule which extends to the costs of the co-respondent which invests the Court with judicial discretion to determine whether he shall pay any and, if any, what part of the costs of the suit. That applies to the claim for damages separately, if need be, and it applies to the suit generally, and if the same considerations affect the suit generally and the claim for damages, the discretion of the Court will be exercised upon the one set of facts which conclude the general suit.

If you have the fairly common case where the co-respondent was well aware of the identity of the respondent, and was guilty of adultery with the respondent with knowledge of the facts, the same causes which led to a judgment against him for the costs of the suit lead to a judgment against him for the costs of that part of the suit which relates to the recovery of damages. He is a wrongdoer in part and in whole and must be dealt with accordingly in regard to the whole matter.

As to the costs of the suit where there is no claim for damages, which has become a comparatively common case, but in the present state of things, as I said on a recent occasion, ought not to be regarded as necessarily the ordinary condition of the suit, the Court, upon finding adultery proved against a co-respondent, has a judicial discretion upon which it has to determine whether he shall pay the costs or part of the costs of the suit. I am not prepared at present to say that in every case in which the co-respondent was not aware that the respondent was a married woman he must escape from costs. In my view, that is an attempted limitation of the discretion which the Legislature has reposed in the Court to which I ought not to assent. Every case must be judged upon its facts and the judicial discretion with regard to the payment of costs, both as to the claim for damages, and as to the suit generally, must be a judicial discretion, as I understand that

1920

LANGRICK v. LANGRICK AND FUNNELL.

The President.

term, exercised with regard to the facts of the particular case. I mention that because I have seen it often treated, and for many years have been accustomed to see it treated, as one of the commonplaces of the Divorce jurisdiction that if the petitioner had not conclusive proof of, or at any rate unless there was a strong case to show, knowledge on the part of the co-respondent, the co-respondent must inevitably be discharged from the costs of the suit.

I deal with these matters in detail not because they are matters in which there is any mystery, but because they are matters arising in the every-day work of the Court, and it is proper that the members of the profession, and particularly the members of the Bar who practise regularly in this Court, should be informed of the grounds upon which the jurisdiction of the Court is being exercised.

Perhaps I should add one other word. I find in the case of *Lord* v. *Lord and Lambert* (1), in which the late Lord Gorell considered both the jurisdiction as to damages, and the jurisdiction as to costs, he expressed the view in the course of the discussion of the case that there may be damages—he did not say how much damages—but that it is possible there may be damages without proof of guilty knowledge, and that the control of the Court over the costs in a case where there was a question as to knowledge is a discretionary control. The argument was submitted to the learned judge that the petitioner was not entitled to ask for costs, the petitioner having no evidence as to the co-respondent's knowledge, and Lord Gorell's reply to that was, "That is discretionary." I refer that opinion of Lord Gorell to the section to which I have already referred, which deals with the power to give costs against a co-respondent, in whole or in part, where he has in fact been guilty of adultery.

Now I come to deal with the particular facts of this case. [His Lordship then went through the evidence and stated that he accepted the evidence given by the respondent and co-respondent, that their first meeting was in one of the public rooms of an hotel in Hull; that he came to the conclusion

(1) [1900] P. 297.

that the respondent, and a friend who was with her there, were not unwilling to meet advances on the part of a man in the position of the co-respondent and the naval man who was with him; and that on that night the co-respondent and respondent went to the petitioner's house and that adultery took place there then, and on another occasion, and afterwards they went away to an hotel in New Holland together for a time in order to commit adultery. He proceeded:] The matter which raises the question in the case is the matter of the communications between the respondent and the co-respondent, what name she gave him, what story she told him, and things of that kind. I do not know who is telling the true story about that, and it is not necessary that I should determine that point. To my mind I have something much more trustworthy than an uncertain conclusion upon conversations which are the subject of dispute—namely, the conduct of the parties. The petitioner, against whom nobody with any warrant for it has made any imputation, is a non-commissioned officer who I am satisfied has held his stripes and has deserved to hold them. I am satisfied that he was a man who did not deserve the reproaches which were levelled at him. In his home, the home in which two or three years before, upon his marriage, the petitioner had installed the respondent, the co-respondent found himself. Now what did the home tell? In the living room of the house were two photographs, one of the woman who was ready to commit adultery with him, as a bride in her wedding dress beside her husband, and another of a group, the bride in her wedding dress, the husband in military uniform with a military and a civilian friend. Here was a home, apparently a decent, comfortable home which was maintained, at any rate as to the substance of it, out of the man's earnings as a soldier, separation allowance and so forth. In that home the co-respondent found himself with evidence unmistakable as to the position in which he was. And if he was so blinded by the animal instincts which took him there that he could not come to the conclusion to which a rational decent man would come with regard to the position in which he was, he must

1920

LANGRICK v. LANGRICK AND FUNNELL.

The President.

not complain if common-sense people, proceeding upon reasonable grounds, come to the conclusion that if he did not know he was in the home of another man, he ought to have known. He had the fullest means of knowledge. He took the woman, whose portrait was on the walls of that house as a bride beside her husband, to a hotel and committed adultery with her there again. This was done by a common assignation between them. He concealed all possibility of their being traced by giving an invented name for himself and the woman, and an invented address, and he described her as his wife, and says she brought a wedding ring.

In my judgment if a man chooses to go about and, careless of right and wrong, commit adultery with a woman, whom any person of common sense could see was probably a married woman, he must take the consequences. Upon the ground of the means of knowledge which he had before his eyes he was not merely guilty of adultery, but his adultery was such as ought to carry with it proper redress (it cannot be compensation) to the petitioner for the wrong he has done. I look at the petitioner's position in life. I do not assess the damage at the value of a wife. There you have to enter into all kinds of questions, moral and metaphysical, which the Court does not have to consider. Here was a man who, not late in life, but when he had been a non-commissioned officer of many years' standing, set up a home, and it was broken up by the guilt of his wife and her adulterer. The home was broken up and the man was exposed to the ignominy which a man suffers, especially when he is treated in that way without any fault on his own part, and damage must be assessed with regard to this. I am satisfied that he was not the author of his own wrong, and I am satisfied that his wife was not going about as a common prostitute. In either of those cases the damages might be cut down to a very small figure indeed. But in such a case as this the damages must be regarded as serious. The petitioner has asked for 150*l*. I want to fix a sum which is fairly sure to be paid. I have said before that it is not wise to give the petitioner such damages as defeat the object of damages because they cannot be paid.

1920

LANGRICK v. LANGRICK AND FUNNELL.

The President.

His Lordship then stated shortly the position of the co-respondent, and assessed the damages at 125*l.*, and ordered the co-respondent to pay the costs.

He refused to make the usual order for payment of the respondent's costs, and ordered the money, which had been paid into Court as security for her costs, to be paid out to the husband on the ground that the respondent had not appeared at the hearing to defend herself, but merely to help the co-respondent.

Solicitors for petitioner: *C. J. Smith & Hudson for G. S. Williamson, Hull.*

Solicitors for respondent and co-respondent: *Collyer-Bristow & Co., for Laverack, Son & Wray, Hull.*

J. R. B.

[IN THE CONSISTORY COURT OF LONDON.]

1920

Feb. 16, 25.

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT *v.* PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST *v.* PARISHIONERS.

Ecclesiastical Law—Faculty—Faculty for sale of Church Plate—Jurisdiction—Discretion.

The Ordinary has, in the exercise of his discretion, jurisdiction in a cause of faculty promoted by the incumbent and churchwardens of a parish within his diocese to grant a faculty authorizing the sale of church plate belonging to the parish, but this jurisdiction should not be exercised without the greatest hesitation and caution and not so as to authorize any unrestricted sale or, in any case, unless the Ordinary is satisfied that the financial position of the parish renders a sale necessary and that the uses of the plate for secular purposes is guarded against.

Where a faculty was granted for the sale of church plate in a case where, in the opinion of the Chancellor of the diocese of London, the straitened circumstances of a parish within the diocese justified a sale, the faculty was decreed on the condition that the destination of the

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

plate should be specified and approved by the Ordinary before the plate was actually sold.

Suggestions as to church plate not in use being placed in a museum on loan from the parishioners and still remaining the property of the parish or being deposited in a treasury or museum to be established in the Cathedral of the diocese.

THESE were two separate causes of faculty promoted one on behalf of the vicar and churchwardens of the parish church of St. Mary, Northolt, and the other on behalf of the rector and churchwardens of the parish church of St. George-in-the-East, both against parishioners of the same for the purpose of obtaining faculties authorizing the sale of church plate belonging to the respective parishes.

1920. Feb. 16. On this day the suits were heard before the Chancellor of the diocese of London (Sir Alfred Bray Kempe, D.C.L.).

The faculties were moved by the Rev. Frederick W. Bussell, vicar of St. Mary, Northolt, and by the Rev. John C. Pringle, rector of St. George-in-the-East, who gave evidence in support of the grant of the proposed faculties. The description of the church plate proposed to be sold and the result of the evidence given by the vicar and the rector on other points appear from the judgment of the Court.

No appearance was entered for any opponent and the suits were undefended.

Cur. adv. vult.

1920. Feb. 25. The Chancellor of the diocese of London delivered one judgment in both cases as follows :—

SIR ALFRED BRAY KEMPE. In each of these cases application is made to the Court to decree the grant of a faculty authorizing the sale of old Communion vessels belonging to the parishioners which have been in use in their churches. The parishioners in vestry have, in both cases, resolved to sell the plate if permitted to do so and no appearance has been entered to the grant of a faculty in either case. That the plate could not be sold without the consent of the Ordinary expressed by a faculty is clear,

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.
THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

and it is equally clear that with such consent the sale can properly take place. The law is thus stated in Prideaux's Churchwarden's Guide, 16th ed. (1895), pp. 333, 334: "As the churchwardens are a corporate body, and for the benefit of the parish, and not to the prejudice of it, they cannot dispose of any of the church goods without the consent of the parish and the licence of the Ordinary: not without the consent of the parish, because they are their goods, and not without the licence of the Ordinary, because they appertain to holy things, of which he hath the care and ordering; and, therefore, if the churchwardens would sell an old bell towards other repairs, or put off old Communion plate to buy new, or dispose of any other of the goods of the church, although to the use of the parish, they cannot do it without the consent of the parish and the licence of the Ordinary as aforesaid; and the disposal of any of the said goods without the consent of the parish is void in law." And the following passage in Phillimore's Ecclesiastical Law, 2nd ed., vol. ii., p. 1420, namely, "A faculty may be granted to sell ornaments or utensils found to be unnecessary, as in the case of old bells when a new peal is set up, or the like" clearly asserts the jurisdiction of the Ordinary in the matter. But though the Ordinary thus has jurisdiction to permit the sale of old Communion vessels, it is a jurisdiction which clearly ought not to be exercised without the greatest hesitation and caution. In the first place the Court should be satisfied that if the sale takes place the sacred vessels will be protected from profane or secular use. The principle that ornaments of the Church devoted to sacred uses should not be applied to other purposes is stated in a Constitution of Archbishop Edmund Rich made in the year 1236 which is to be found in Lyndwood's Provinciale at pp. 33, 34: "Panni Chrysmales non nisi in usum ornamentorum Ecclesiae convertantur: similiter alia ornamenta ecclesiae quae pontificalem accipiunt benedictionem nullo modo in prophanos usus depulentur;" which is thus translated in Johnson's Ecclesiastical Laws: "Let the Chrysoms be made use of, for the ornaments of the Church only: let the other ornaments

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

of the Church which have been blest by the Bishop be applied to no common use." Modern religious feeling does not sanction a departure from this principle. The vessels which have been made use of for the administration of the Holy Communion should not be sold so that, for instance, they may become merely the ornament of a rich man's sideboard or table; and I am as at present advised not able to see any circumstances under which the Court would be justified in permitting the sale of such vessels without restrictions and could allow them to pass into the hands of a dealer for resale to an unknown purchaser. But even if there be no danger of the vessels being applied to secular uses, for example if they are to be sold for use in another church or for preservation in a museum, the fact, if it be so, that they have for a long period been associated with the worship of the Church or have been the gift of a pious donor who could not have wished that his offering should be alienated from the church with which he desired to associate it can obviously not be ignored. Objects thus intimately connected with the history of a church clearly ought, if possible, to remain among its cherished possessions.

Such considerations would seem to afford reasons against the sale of Communion plate even in cases where owing to its circumstances, character or its great value and the difficulty of properly guarding it it has ceased to be used and is for safety locked away in a bank and has been replaced by more modern vessels. There would however in such a case be no reason why the objects should not be deposited on loan in a museum so that they still remain part of the property of the church. One might venture to suggest that the creation of a treasury or a museum in connection with the Cathedral of the diocese, where such unused and valuable ornaments should be open to inspection and properly guarded in a way they could not be if kept in the churches to which they belong, might be a desideratum.

Cases may no doubt arise where urgent necessity compels the parishioners to part with their property in such ornaments, and for this purpose to seek the leave of the Court to sell.

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

In such cases the Ordinary, if satisfied that the necessity for the sale arises owing to some need directly connected with the church in which the vessels were used, and that the use of them for secular purposes is guarded against, may feel constrained to accept the plea of necessity as overriding the considerations which stand in the way of alienation. The question is whether such necessity exists in the cases now before me.

St. George-in-the-East. Taking first the case of St. George-in-the-East, I can entertain no doubt after hearing the evidence of the rector that the circumstances are such that if in any case the sale of sacred vessels would be justifiable it would be so here. The financial position of the parish is as bad as it could be. It is in the neighbourhood of the London Docks, and there has been in recent years a very large encroachment of the Jewish population and of Irish Roman Catholics. The only ordinary English residents are those who could not get away. The direct result is that the actual expenses of maintaining the church cannot be met by collections and the deficit on the churchwardens' accounts for the last year has been 230*l.* The church urgently needs many repairs and there are three mission buildings all in bad repair. In one of these the water is coming through the roof. Another is flooded by sewage, and the cost of curing this would be so heavy that there is an impasse as to what could be done. The Archdeacon had obtained 350*l.* from the City Parochial Charities Fund, which would be payable if 560*l.* was spent within twelve months. 93*l.* had been raised and had been given by people who could not be asked again. The immediate purposes for which the money is desired are the repair of the heating apparatus of the church and the lighting of it by electric light. These are essential if a congregation is to be attracted.

The plate which it is desired to sell consists of two flagons, two chalices and two patens of solid silver, the date of which is about 1729, and two flagons, one chalice, and one dish of Stafford plate of date 1810. The Stafford plate was at one time lent to the parish of St. Matthew, a parish which had

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

been carved out of St. George-in-the-East in 1852 and since reunited to it. There seems to be nothing to show that any of the plate was a gift. As to the value of it, it seems that a well-known firm of silversmiths had valued the silver vessels at 350*l.* if no restrictions were imposed as to the purchaser, but thought that the Sheffield plate was of no considerable value. The old silver vessels had not been used for a generation and were now lodged at a bank. The Sheffield plate had not been used for twenty years. The vessels now in use were two chalices, two patens and cruets of modern type.

In view of the financial straits of the parish, the petitioners thought they ought to ask permission to sell the plate without any restriction. In asking this the rector said that no one would be likely to buy it who would not be interested in it for its own sake—that it would not appeal to any one who was not interested in the history of the Church of England. This possibility does not appear to me to be sufficient to justify an unrestricted sale in view of the possibilities which exist as to its secular use.

The circumstances of the parish to which I have alluded are, however, in my opinion, clearly such that the Court could not properly altogether refuse to grant the application of the parishioners for leave to sell the plate, and I am prepared to decree a faculty for that purpose, subject to the destination of the plate being specified and approved by the Chancellor of the diocese before the plate is actually sold.

St. Mary, Northolt. In the case of St. Mary, Northolt, the Court is asked to sanction the sale of a silver chalice and paten which, by the silver mark, are of the date 1702. There is no name of any donor or inscription on either. They are not now in use. They have been replaced by a silver gilt chalice and paten. The grounds on which the sale was desired, as stated in the petition, is that money was needed to pay for repairing some thirteenth-century windows in the church. This work has, however, already been done under the care of the Society for the Protection of Ancient Buildings, and the cost, 138*l.* 0*s.* 4*d.*, has been paid partly by collections and donations amounting to 69*l.* 4*s.*, and partly by an

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.
THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

advance by the rector which he hopes to have repaid at some time. It is not suggested that the benefice is a poor one. What is now asked is that the sale may be sanctioned in order to provide a fund, which would be invested, for repairing the church which is an old and very interesting one. It is said that at least 200*l.* is required for the repair of the roofs and porch; that Brasenose College, who are the patrons, as they own no property in the parish make no grants to it, and there are no means of raising this 200*l.* The population of the parish is an agricultural one. There are twenty houses in the village and others in outlying hamlets; none of these are big houses. The annual expenditure on the church is small —about 60*l.*—which is just met by collections and donations. The lord of the manor has sold all his property in the parish and Lord Hillingsdon is about to do the same; and there will in the immediate future be a large number of new houses built to provide for an influx of factory operatives who cannot, it is suggested, be expected to feel any old ties with regard to the church.

It is clear here that no such urgent necessity exists as in the case of St. George-in-the-East. Moreover, I cannot assume that the incoming population will not take an interest in the old church which will be in their midst and will not be prepared to keep it in repair; nor that the patrons could be wholly deaf to appeals to maintain the interesting building with which they are so closely associated; nor that others who care for the maintenance of our ecclesiastical and archæological treasures would refuse to assist. The rector himself stated in Court that the Society for the Protection of Ancient Buildings had recently sent him a donation.

Under these circumstances I can see no reason for sanctioning the dissociation from St. Mary's of the sacred vessels which have been associated with it for over 200 years and have been out of use for only ten years. In answer to my question why they had been disused, the rector replied that he thought because it was considered that the chalice was too cumbersome for use in the parish church.

1920

THE VICAR AND CHURCHWARDENS OF ST. MARY, NORTHOLT v. PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE-IN-THE-EAST v. PARISHIONERS.

"It was," he had previously said, "in the rather big cumbrous style of Queen Anne." But it had been in use for two hundred years and it is now proposed to sell it for use in some other church; I am unable to see that I can regard its disuse as arising from or being justified by its being unfit for use, or that the fact that these vessels form a part of the history of their church cannot be kept before the parish—as it should be—if in no other way by their occasional use on festivals. I am not prepared to decree the grant of a faculty in such a case as this.

C. F. J.

1920

Feb. 20.

[ADMIRALTY.]

THE DANUBE II.

[1918, fol. 942.]

Admiralty—Public Authority—Servants of the Crown—Action against Commanding Officer of King's Ship—Limitation of Actions—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 51)*—Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.

The Public Authorities Protection Act, 1893 (1), applies to servants of the Crown acting within the scope of their public duties, and the Act is not impliedly repealed, as regards claims for damage, by s. 8 of the Maritime Conventions Act, which provides that no action shall be maintainable to enforce any claim against a vessel or her owners [or any other person responsible for the fault of the vessel (s. 9)] in respect of any damage to another vessel unless the proceedings are commenced within two years.

Accordingly, actions against commissioned officers in charge of

(1) Sect. 1 provides that where "any action . . . . is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution . . . . of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority . . . . the action shall not lie . . . . unless it is commenced within six months next after the act, neglect or default complained of. . . . ."

King's ships for damage by collision must be commenced within six months, and not within the period of two years allowed by the Maritime Conventions Act.

1920

THE DANUBE II.

ACTION of damage by collision.

The plaintiffs were the owners, master, and crew of the Norwegian steamship *Norrona*; the defendant was Lieut. Harry Jewiss, R.N.R., the officer in charge of H.M. tug *Danube II.*

The collision occurred on December 7, 1917, in the Thames estuary, where the *Norrona* was lying at anchor in the course of a voyage from Fécamp to Middlesbrough in ballast. The *Danube II.* was towing a battle-practice target from Portsmouth to Scapa Flow and the target came in contact with the *Norrona* and sank her. The plaintiffs issued their writ on December 17, 1918.

The defendant's case was that without any negligence on his part the target took a sudden sheer to port, and that it was not possible to prevent it striking the *Norrona.* Alternatively, the defendant pleaded that he was acting in pursuance or execution, or intended execution, of a public duty or authority, and that as the action had not been commenced within six months after the act, neglect, or default complained of, he was entitled to rely on the Public Authorities Protection Act, 1893, and the claim must be dismissed.

Hill J., sitting with two of the Elder Brethren of the Trinity House, found the defendant alone to blame for the collision.

C. R. Dunlop K.C. (*Sir Gordon Hewart A.-G.* with him) for the defendant. The defendant was under a public duty to tow the battle target to Scapa Flow, and the negligence found was a negligence in the execution of that duty; the case therefore comes within the express words of the Public Authorities Protection Act.

[HILL J. The statute has never been pleaded before in respect of the officer of a King's ship?]

It does not appear to have been pleaded, but it has been

1920

THE DANUBE II.

held to apply to the colonel of a volunteer regiment: *Wilson* v. 1*st Edinburgh City Royal Garrison Artillery Volunteers* (1); see also *M'Ternan* v. *Bennett* (2), where the statute was pleaded on behalf of police officers, and although the plea failed, as the acts complained of did not arise in the course of the officer's duties, it was not contended that the Act did not apply to the Glasgow police force. The Act is not impliedly repealed, as regards actions of damage by collision, by s. 8 of the Maritime Conventions Act, which provides that no action shall be maintainable to enforce any claim against a vessel or her owners [or any other person responsible for the fault of the vessel (s. 9)] in respect of any damage to another vessel unless the proceedings are commenced within two years. The two statutes can be read together. The Maritime Conventions Act applies to collision actions generally except to the particular cases covered by the Public Authorities Protection Act. [*Salisbury* v. *Gould* (3) was also referred to.]

Stephens K.C. and *Dumas* for the plaintiffs. There is not a single reported case in which the Public Authorities Protection Act has been pleaded on behalf of a servant of the Crown. In *Wilson* v. 1*st Edinburgh City Royal Garrison Artillery Volunteers* (1) and *M'Ternan* v. *Bennett* (2) the Volunteer Association and the City of Glasgow Police, respectively, were liable to be sued. The Crown is not liable to be sued and therefore is not a "public authority" requiring protection. Assuming however that the Act applies to servants of the Crown, as regards Admiralty actions it is impliedly repealed by s. 8 of the Maritime Conventions Act: cf. *The Caliph* (4), where it was held that in actions for loss of life arising out of collisions dependants had two years in which to bring their actions and not one year as provided by Lord Campbell's Act. [Reference was also made to *Parker* v. *London County Council.* (5)]

(1) (1904) 7 F. 168.
(2) (1898) 1 F. 333.
(3) (1904) 68 J. P. 158.
(4) [1912] P. 213.
(5) [1904] 2 K. B. 501.

1920

THE DANUBE II.

C. R. Dunlop K.C. in reply. It appears that although there are no reported cases in which the protection of the Public Authorities Protection Act has been claimed on behalf of a servant of the Crown, the question arose for decision in *Benney* v. *Fitzgerald* (1), an action in the King's Bench Division, heard before Darling J., in which the plaintiff, a cab driver, sued the defendant, a staff sergeant in the Army Ordnance Corps who was driving a motor lorry belonging to H.M. War Department, for negligently colliding with the cab. The action, not having been commenced within six months, junior counsel to the Treasury, who appeared for the defendant, argued that the Act applied to servants of the Crown and referred to an unreported decision of Lawrence J. in *Sexty* v. *Wells* (2), a precisely similar case tried at the Gloucester Assizes, the defendant being a soldier in the Royal Flying Corps who negligently drove a Government motor car. Lawrence J. held that the Public Authorities Protection Act applied, and, the action not having been commenced within six months, entered judgment for the defendant with costs as between solicitor and client, and Darling J., following that decision, took the same course. There is no distinction in principle between a soldier negligently driving a Government car and a sailor negligently navigating a Government tug. As regards the contention that the time is impliedly extended by the Maritime Conventions Act, there is no analogy between the Public Authorities Protection Act and Lord Campbell's Act; the Maritime Conventions Act dealt expressly with life claims and gave a new remedy in rem to dependants. As regards life claims, therefore, it extended the period allowed by Lord Campbell's Act, and *The Caliph* (3) is only an authority for that proposition.

HILL J. In this case a further question has been raised for argument, based upon the paragraph in the defence that the defendant is entitled to the protection of the Public

(1) Unreported, June 27, 1918. (2) Unreported, June 14, 1917.
(3) [1912] P. 213.

1920

THE DANUBE II.

Hill J.

Authorities Protection Act, 1893. The circumstances are these: the claim having been intimated to the Admiralty, the Admiralty offered to accept liability upon the basis that they should compensate as if they were entitled to limit their liability to the tonnage of the tug as ascertained in accordance with the provisions for limitation of liability contained in s. 503 of the Merchant Shipping Act, 1894. They were willing to pay that amount. The plaintiffs were not satisfied with that, and issued their writ on December 17, 1918, against Mr. Harry Jewiss, the master of the tug *Danube II.* whom I have found to have brought about the collision with the steamship by reason of his negligence.

I have to decide whether that action ought to have been brought within six months from December 8, 1917, when the collision happened. It was not brought until rather more than one year after. The defendant's counsel say that they are entitled to the protection of the Act, because the action, being against the master of the tug, is an action against a person in respect of neglect in the execution of a public duty. The plaintiffs, on the other hand, say, first, that the Public Authorities Protection Act does not apply at all to servants of the Crown but only to public authorities other than the Crown and to servants of such public authorities. Secondly, they say that if it does apply to servants of the Crown, and protection would be given by the Act if it stood by itself, then, by reason of the Maritime Conventions Act, 1911, which provides in respect of claims for damage and salvage a different period, namely, two years, s. 1 of the Act of 1893 must, so far as actions for damage are concerned, be taken to be impliedly repealed by the Maritime Conventions Act.

The proposition of the defendants, I confess, was to me a startling one. It is not disputed by the defendants that this defence would be open in every case of negligent navigation of a King's ship in an action brought against her navigating officer; so that in every such case unless the action were brought within six months the defence afforded by the Public Authorities Protection Act would be open to him. And, if the navigators of King's ships who are negligent in

their navigation are persons who are acting in the execution of a public duty within the meaning of the Act, then every servant of the Crown who is carrying out similar duties and who is negligent in the performance of them is also protected by the Act. I instanced the case of the telegraph messenger who was negligent in riding his bicycle while carrying telegrams and knocked a man down, and Mr. Dunlop admitted that his argument carried him to that extent. No such plea has ever been raised in this Court, nor, so far as I know, has any claim been made for costs as between solicitor and client. So far as the experience of the practitioners in this Court goes this contention is new since the Public Authorities Protection Act was passed in 1893. The Court however has to see what the Act means and what are the facts with regard to the defendant in this case. The defendant at the time of this accident was a commissioned officer in the Royal Naval Reserve; he was master of a Government tug; that is to say, a tug which was under requisition and in commission; he was engaged in the duty of towing Government property, a battle target, from Portsmouth to Scapa Flow; and in the course of that voyage and in performing that duty, having to come to anchor in accordance with the orders of a patrol boat, he so negligently managed his tug and tow that he came into collision with the plaintiffs' ship.

If I had to decide this question without having any authority on the matter I should have had very grave doubt whether this Act, which deals with public authorities and their servants, dealt also with servants of the Crown; but Mr. Dunlop has referred me to a decision of Darling J. in *Benney* v. *Fitzgerald* and a reference in the course of Mr. Branson's argument in that case to a decision of Lawrence J. in *Sexty* v. *Wells*. Neither of these are reported decisions, but they are, to my mind, quite indistinguishable from the present case. In both cases actions were brought against persons in the Army in respect of negligence in driving motor vehicles belonging to the War Office, and in each case the Act was held to apply to such persons. I can see no distinction at all, nor can

1920

THE DANUBE II.

HILL J.

Mr. Dumas see any distinction, between those cases and the case of a man who is navigating a Government tug, and I feel bound to follow those decisions and take them as my guide. I therefore hold that the Act does apply to this defendant.

The next question is whether it was impliedly repealed by the later Act, the Maritime Conventions Act, 1911. As I understand it, having two statutes on the statute book, the Court must, if it can, read them both as subsisting statutes, and not, unless it is clearly driven to it, treat one as repealing the other. One of them, the earlier Act, gives a limitation of six months in favour of a limited class of people; the other creates a limitation of two years in respect of a limited class of causes of action. They are not both of them in terms dealing with the same matter. I think it may be that the explanation of the decision in *The Caliph* (1) is this: that both Lord Campbell's Act and the Maritime Conventions Act are, in terms, dealing with claims for loss of life and giving different limitation periods; and, it may be, in such a case, the later Act must be taken to impliedly repeal the earlier Act. But here the two Acts are not dealing with the same thing; they cut across one another; and it seems to me that the Court is not driven to say that either is inconsistent with the other. Reading the two together, the limitation imposed by s. 8 in the Act of 1911 of two years can well be read as being subject to the qualification that it does not apply to persons to whom the Public Authorities Protection Act applies, and in their case it will still remain six months.

I rather regret that this is the result of what I regard as the logic of the argument, because I think that six months in respect of ships and persons who may be in charge of ships, when their negligence may happen on the ocean, may work out to be a very short limitation indeed, and the period of two years seems to me to be quite short enough. However, that the result works out in a way of which I do not personally approve is nothing to the point; the question is: what is the law? and the conclusion that I have arrived

(1) [1912] P. 213.

1920

THE DANUBE II.

Hill J.

at is that the law is as I have stated. Therefore, this defence will be held to be good.

There will be judgment for the defendant with costs, other than the costs of the issue of negligence, which will be the plaintiffs'. The costs that the defendant recovers will be taxed as between solicitor and client.

Solicitors for the plaintiffs : *Constant & Constant.*
Solicitor for the defendant : *The Treasury Solicitor.*

E. C. T.

[ADMIRALTY.]

1920

Feb. 25, 26; *March* 1.

THE CRETEFOREST.

[1919, fols. 723 and 782.]

Admiralty—Practice—Tenders in Salvage Actions—Lump Sum Tender to separate Salvors—Costs—Separate Representation of Master and Crew.

In a consolidated salvage action the tender by defendants of a lump sum to answer several claims of salvors is a valid tender; but, where defendants have adopted this course, they run the risk that the Court may hold that it was reasonable for the plaintiffs to proceed to trial although the tender is upheld.

In a consolidated salvage suit where the owners of two tugs, separately owned, joined in one writ and the masters and crews in another, the defendants tendered a lump sum which the Court upheld; but as the defendants' affidavit of values was only handed to the plaintiffs on the day of the trial:—

Held, that the plaintiffs who had been given the conduct of the consolidated action (the tug owners) were entitled to their costs.

Held, further, that the interests of the masters and crews being identical with those of the owners, the masters and crews were not entitled to be separately represented at the expense of the defendants.

Observations on the desirability, except in very special circumstances, of masters and crews joining in one action with the owners.

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs in the first action were the owners of the steam tugs *Knight Templar* and *Expert;* the plaintiffs in the

1920

THE CRETE-FOREST.

second action were the masters and crews of the two tugs. The defendants in both actions were the owners of the barge *Creteforest*, her cargo and freight.

The two actions were consolidated and the conduct was given to the owners of the tugs. Separate statements of claim were delivered by the owners and by the masters and crews, and one defence was delivered in the consolidated actions in which it was pleaded that "The defendants bring into Court the sum of 400*l*., and say that whatever view the Court may take of the facts, the same is more than sufficient to satisfy the claims of the plaintiffs in this consolidated action." In their reply the tug owners put the defence in issue including the sufficiency of the tender. There was no separate reply by the masters and crews. The case came before Hill J. and two of the Elder Brethren on February 25 and 26.

His Lordship in giving judgment said that on the advice he had received he had come to the conclusion that the tender was sufficient. The *Knight Templar* was a tug of 146 tons gross, with a crew of 12 hands, and of the value of 18,000*l*. The *Expert* was of 100 tons gross, with a crew of 9 hands, and of the value of 16,000*l*. The *Creteforest* was a concrete dumb barge laden with a cargo of coal which was stated to have been requisitioned by the Government and therefore not subject to the jurisdiction of the Court. The value of the barge as pleaded and as sworn to in the defendant's affidavit of values was 12,000*l*. She had come to an anchor on the evening of October 10, 1919, and had anchored with both anchors down to the northward of the Egremont landing stage. Later she dragged and her starboard anchor fouled the N.E. mooring of the stage. On the night ebb tide she swung clear of the stage, but on the early morning tide of October 11 although she cleared the stage she grounded to the northward of it. The port anchor had previously been slipped and the starboard anchor was still foul of the mooring of the stage. The landing stage people had offered the master of the *Creteforest* the use of one of the Mersey luggage ferry boats to assist in holding the *Creteforest* when she swung, but just when the ferry boat was preparing

1920

THE CRETE-FOREST.

to make fast, the *Knight Templar* arrived and the master took the assistance of that tug. The *Knight Templar* towed the *Creteforest* stern first towards the flood, but as the flood tide made it got too strong for the tug and the *Creteforest* stranded again. A little later the *Knight Templar* made fast again, and the *Expert*, which had by this time come across the river, also made fast, and after towing in various directions the two tugs succeeded in getting the *Creteforest* off and into the river. Subsequently she was taken into dock by the *Expert* and another tug. In the opinion of the Court the first operation of the *Knight Templar*, although well intentioned, did not in fact improve the position, but rather the reverse, and the real service was done when the *Knight Templar* and the *Expert* were fast together. That service, lasting a short time, was a very simple one, and on a value of 12,000*l.* to his Lordship's mind 400*l.* was ample. The horse power of the tugs was about the same and they were both engaged in the principal work. Therefore, his Lordship said, he awarded to each of them 200*l.* He had been asked to apportion the awards and he gave three-fourths to the owners and one-fourth to the master and crew in the case of each tug. He adjourned the question of costs and of the separate representation of the masters and crews for further argument.

D. Stephens K.C. and *G. P. Langton* for the plaintiffs, the owners of the two tugs.

C. R. Dunlop K.C. and *G. J. Lynskey* for the plaintiffs, the masters and crews of the tugs.

Batten K.C. and *Alfred Bucknill* for the defendants.

[The arguments are fully set out in the judgment. In addition to the cases there cited *The Strathgarry* (1) and *Smurthwaite* v. *Hannay* (2) were referred to.]

Cur. adv. vult.

March 1. HILL J. In this case, where salvage was claimed by the owners of two tugs and their masters and crews, I upheld the tender of 400*l.* This tender was made on

(1) [1895] P. 264. (2) [1894] A. C. 494.

1920

THE CRETE-FOREST.

HILL J.

February 9, 1920, and on that date the defence pleading the tender was delivered. The reply was delivered on February 11, 1920, and issue joined. The affidavit of values was sworn on February 24, 1920, the value of the *Creteforest* being sworn at the value stated in the defence. The case was in the list for February 25, 1920, and was heard on that and the following day. The question is whether the plaintiffs should be condemned in costs or allowed no costs after the date of the tender or some later date.

Two points were argued. First, it was said for the plaintiffs that the tender was bad because it was a tender of one sum to answer several claims. The owners of the two tugs joined in one writ, but the owners were different persons. The masters and crews of the two tugs joined in a second writ. The two actions were consolidated. Such consolidation was according to the almost invariable practice of the Court, and in the present case was beyond all question properly ordered.

Is it a bad plea to plead a lump sum tender in consolidated salvage actions? I hold that it is not a bad plea. If it is embarrassing to the plaintiffs they can ask for particulars, and in a proper case they will obtain an order directing the defendants to apportion the lump sum. See *The Burnock* (1), which laid down no new practice, but is only an illustration of an existing practice. The judgment in *The Burnock* (1) clearly recognizes that the plea is good, for it considers the circumstances in which defendants will be ordered to give particulars apportioning the payment and the circumstances in which they will not. So in *The Lee* (2) it was never suggested that the plea was bad. I was referred also to *Benning* v. *Ilford Gas Co.* (3), a case in which several plaintiffs had joined under Order XVI. (1.) in respect of separate causes of action arising out of the same transaction. But I prefer to rest my decision upon the Admiralty practice and the Rules of Court as applied to the Admiralty practice. Consolidation in Admiralty is an old practice of the Court, and Admiralty actions, especially salvage, damage, and wages actions have features of their own which

(1) (1914) 12 Asp. M. L. C. 490. (2) (1889) 6 Asp. M. L. C. 395.
(3) [1907] 2 K. B. 290.

are not found in any actions in the other Divisions of the High Court of Justice: See *The Maréchal Suchet.* (1) I think the plaintiffs' objection to the plea as a plea fails.

The second question is this. The plea being good, and the defendants having succeeded upon it, it was said for the defendants that they were entitled to costs from the date of payment in. Here again the peculiar features of a salvage action and of consolidated actions in Admiralty must be considered.

The Lee (2) shows that where the defendant has paid in one sum to answer several consolidated claims, he runs the risk that the judge may say that it was reasonable for the plaintiffs to go on to trial, even though the tender is upheld. And in salvage actions, until the values are proved or agreed, the plaintiffs always have a difficulty in arriving at a conclusion whether the tender is sufficient—a difficulty which is peculiar to salvage actions. It is considerations such as these that make it essential that the Court should not fetter itself by any hard rules in regard to costs, and should exercise its discretion judicially with reference to the particular facts of each case.

In the circumstances of this case, and especially having regard to the fact that the affidavit of values was only handed to the plaintiffs on the day of the trial, I allow the plaintiffs their costs. It is said that the affidavit was not sworn earlier because of the illness of the gentleman who swore it. That is the misfortune of the defendants; it ought not, in my view, to prejudice the plaintiffs.

There is a further question. I was asked to make an order for separate representation of the masters and crews of the two tugs who were represented by two counsel, separately instructed. As I have already stated, the masters and crews issued a separate writ. This was in accordance with a practice adopted in the Mersey during the last few years, whereby masters and crews of Mersey tugs refuse to join in salvage actions brought by tug owners and insist upon instructing separate solicitors and upon issuing a separate writ. The actions were according to the practice of the Court consoli-

(1) [1896] P. 233. (2) (1889) 6 Asp. M. L. C. 395.

1920

THE CRETE-FOREST.

Hill J.

dated by order, and the conduct of the consolidated actions given to the owners of the tugs. Of course, where actions are consolidated it is for the proper officer of the Court to determine who should have the conduct, and he has to have regard to the various interests and other matters in deciding in any particular case who should have the conduct. In this particular case, as I have said, he decided that the owners of the tugs should have the conduct.

The object of consolidation is to save costs. In *The Jacob Landstrom* (1) Sir Robert Phillimore quoted Dr. Lushington in *The William Hutt* (2), where Dr. Lushington said: "According to my knowledge the universal practice of the Court has been to consolidate actions where the decision of each action depends on precisely the same facts; and in salvage suits the Court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter." Barnes J. in *The Maréchal Suchet* (3) emphasized the second consideration. That object, the object of saving costs, would be defeated and the saving of costs reduced to a minimum if each of the salvors could, whatever the circumstances of the case, insist that he was entitled to be separately represented, instruct separate solicitors and separate counsel and charge the costs so incurred upon the defendants, the owners of the salved property. In proper cases it is the practice of the Court to allow, as against the defendants, the costs of separate representation, sometimes by one counsel and, more rarely, by two. It depends upon the circumstances of the case.

But separate representation at the expense of the defendants is not a matter of right, and it is not, and ought not to be, allowed unless there is some good and sufficient reason why the several plaintiffs in the consolidated actions cannot be properly represented jointly. If, as against the defendants, the interests of the plaintiffs are identical, or substantially identical, there

(1) (1878) 4 P. D. 191, 193. (2) (1860) Lush. 25, 27.
(3) [1896] P. 233.

1920

THE CRETE-FOREST.

HILL J.

is no reason why the plaintiffs cannot be properly represented jointly.

In the present case, as against the defendants, the interests of the owners and of the master and crew of the *Knight Templar* were absolutely identical, and the interests of the owners and of the master and crew of the *Expert* were absolutely identical.

There could be no conflict as to the services of the masters and crews as distinguished from the service of the tugs. Nothing was alleged in the statement of claim of the masters and crews to suggest any special or extraordinary services of the masters and crews which might call for separate treatment. The statement of claim as it stands might have been delivered as the statement of claim of the owners, masters and crews. Nothing was added to the information of the Court by the evidence called for the masters and crews—in fact, only one master, and no one else, was called for the second plaintiffs on the issues against the defendants. The owners, masters and crews had a common interest in making out the service to be as good as possible, and in obtaining as big an award as possible. As against the defendants, they were in no sort of conflict inter se.

In such circumstances it would, in my judgment, be most oppressive if the defendants were made to bear the costs of two-fold representation, two sets of counsel, two solicitors' attendance, two briefs.

If in such a case as the present any conflict can at any time arise between tug owners and the masters and crews of tugs, it can only be a conflict in which the defendants are not interested—namely, as to apportionment. In the present case no real conflict could arise, for, first, there were no special circumstances, and the sort of proportion allowed by this Court in ordinary cases is familiar to all; and, secondly, I was informed that there is in the Mersey an agreed scale between owners and men. But if any difficulty as to apportionment was anticipated, the masters and crews could always protect themselves by giving no authority to ask for apportionment at the hearing, and then, failing agreement with the owners, taking proceedings for apportionment. The Court

1920

THE CRETE-FOREST.

HILL J.

is always zealous to protect masters and crews in respect to salvage services, and will see that no injustice is done to them.

Further, I cannot in the present case hold that the defendants have brought a twofold representation upon themselves by tendering a lump sum.

Some evidence was given—I am not sure that I should have admitted it, but I was unwilling to shut it out—as to the reasons why the masters and crews desire separate representation, but they seem to me to be quite irrelevant to the question I have to decide. Masters and crews of tugs are apprehensive that tug owners may not claim salvage in cases where one of their regular customers owns the salved property, or for some other reason they may think it good business not to put forward a claim where salvage has been rendered, and that that will prejudice the claims of the masters and crews. But if that happens the masters and crews can always protect themselves. If the owners do not sue, the masters and crews can. In a case set down for hearing this week I shall be dealing with an action in which the masters and crews of tugs are bringing a suit, the owners not having put forward a claim.

The Court will always protect masters and crews and see that no injustice is done to them, and that their claims are carefully considered whether the owners are suing or not. When a case comes before the Court it is acknowledged that masters and crews get the consideration they desire, and it is proper to observe in this case that the only master who was called stated that he did trust his owners and had in the past joined in actions with them.

The result is that in this case I can see no reason at all for allowing separate representation. On the contrary I see very good reason for disallowing it. I hope in future that masters and crews of tugs upon the Mersey, unless there is some very good reason, will see fit to join with their owners in salvage actions. I cannot compel them to do so, but that is the hope I express. I believe they will get proper treatment from their owners, but I am sure they will get proper treatment from the Court.

1920

THE CRETE-FOREST.

Hill J.

The result will be that the plaintiffs, who were given the conduct of the actions, the tug owners, will have their costs, and with regard to the masters and crews I refuse separate representation and make no order as to their costs.

Solicitors for the tug owners: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the masters and crews: *Vizard, Oldham, Crowder & Cash for G. J. Lynskey & Son, Liverpool.*

Solicitors for the defendants: *Downing, Handcock, Middleton & Lewis for Middleton & Co., Sunderland.*

E. C. T.

[ADMIRALTY.]

1920

Feb. 12, 13, 18.

THE LLANDOVERY CASTLE.

[1919, fol. 230.]

Admiralty—Salvage—Limitation of Actions—Defences based on Statutes of Limitation—Unconditional Appearance to Writ—Waiver—Discretionary Powers—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

Sect. 8 of the Maritime Conventions Act, 1911, provides that no action shall be maintainable to enforce any claim against a vessel or her owners in respect of (inter alia) salvage services unless the proceedings are commenced within two years from the date when the services were rendered:—

Held, that by entering an unconditional appearance to a writ issued more than two years after the date of the services, defendants do not waive the right of pleading the protection of the statute in their defence and raising it at the trial of the action.

ACTION OF SALVAGE.

The plaintiffs were the master and crew of the North Eastern Railway Co.'s steamtug *William Gray*; the defendants were the owners of the steamship *Llandovery Castle*, a vessel of 11,423 tons gross, valued at 550,000*l.*

The plaintiffs claimed salvage remuneration for services alleged to have been rendered to the *Llandovery Castle* while

1920

THE LLANDOVERY CASTLE.

on fire off Dover on December 7, 1916. The alleged services are fully described in the judgment.

The writ, which was a writ in rem, was not issued until April 2, 1919. Meanwhile the *Llandovery Castle*, which had been taken over by the Government and used as a hospital ship, had been sunk. The defendants' solicitors accepted service of the writ and indorsed it with an undertaking to appear in due course. Pleadings were delivered in the usual way, and in their defence, in addition to denying that any salvage services were rendered, the defendants pleaded that the action was not maintainable as, under s. 8 of the Maritime Conventions Act, 1911 (1), it ought to have been brought within two years from the date of the cause of action.

Laing K.C. and *Lewis Noad* for the plaintiffs. By entering an unconditional appearance the defendants must be taken to have waived their rights under the Maritime Conventions Act. Further, up to the time when the *Llandovery Castle* was sunk in July, 1918, she was employed as a hospital ship in Government service and therefore not subject to arrest. Had she been afloat the plaintiffs would have had the right to arrest her as soon as she ceased to be on Government service notwithstanding the lapse of two years: see the second proviso to s. 8 of the Maritime Conventions Act. The plaintiffs ought not to be put in a worse position merely because the ship has been lost through enemy action. The plaintiffs had been in Government service on board the tug continuously down to the time the action was brought and they had been expecting the tug owners, the North Eastern Railway Co., to institute proceedings.

Balloch for the defendants. The usual and proper course for plaintiffs who are out of time is to apply to the Court for leave to issue a writ. The plaintiffs did not do this,

(1) Sect. 8: "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of . . . . any salvage services, unless proceedings therein are commenced within two years from the date when . . . . the salvage services were rendered. . . . ."

1920

THE LLANDOVERY CASTLE.

and, the writ having been issued, the defendants are entitled to plead a limitation statute in their defence: see Order XIX., r. 15. Sect. 8 of the Maritime Conventions Act provides that "no action shall be maintainable" after two years, and the defendants cannot be precluded from relying on this provision merely because the appearance was not under protest. There being no res the writ in rem was bad. By appearing to it the defendants turned the proceedings into an action in personam: *The Dictator* (1), *The Gemma* (2); and such an action could have been brought at any time within the prescribed period of two years. The fact that the *Llandovery Castle* was not subject to arrest is therefore immaterial. On the facts no services of a salvage character were rendered, there is therefore no ground for exercising the discretion given to the Court to extend the time if the special circumstances of the case require it.

Cur. adv. vult.

Feb. 18. HILL J. In this case the master and crew of the tug *William Gray* claim remuneration for salvage services alleged to have been rendered to the steamship *Llandovery Castle* in December, 1916. No claim is or has been made by the owners of the tug.

The right of the plaintiffs to recover is disputed on two grounds: first, that they rendered no services of a salvage character, and, secondly, that the claim is barred by s. 8 of the Maritime Conventions Act, 1911.

The *William Gray* was a steam tug fitted with salvage plant and carrying a crew of ten hands all told. She was in Government service, stationed at Dover, where she was employed in whatever work the Admiralty required of her. In December, 1916, the master and crew were the servants of the owners of the tug and not of the Crown.

The *Llandovery Castle*, belonging to the Union-Castle Mail Steamship Co., was also in Government service. On the evening of December 6, 1916, while the *Llandovery Castle* was lying at Folkestone, on a voyage in ballast from Tilbury

(1) [1892] P. 304. (2) [1899] P. 285.

1920

THE LLANDOVERY CASTLE.

HILL J.

to Havre, fire was discovered in the stores in the lower No. 4 hold, and later the fire spread to wooden fittings which were stored in No. 5 hold. The ship's hoses were got to work, and the *Llandovery Castle* made for Dover, sending wireless messages asking for a salvage tug and pilot. She was met by the *Lady Brassey*, one of the powerful Dover tugs in Government service, and she followed the tug towards Dover with the intention of entering Dover Harbour. Meantime, by orders of the Admiralty, the *William Gray* proceeded out shortly after midnight. She took on board her Captain Iron, who was both King's harbour master and Admiralty salvage officer at Dover. There were a number of warships in the harbour, and Captain Iron was unwilling that the *Llandovery Castle* should enter the harbour during darkness.

When the *William Gray* met the *Llandovery Castle* and the *Lady Brassey* about two miles outside the entrance, Captain Iron directed the ship to follow him, and the *William Gray*, with Captain Iron on board, led the *Llandovery Castle* to an anchorage to the westward of the Admiralty pier. Captain Iron then boarded the *Llandovery Castle* and directed the operations, while the *Lady Brassey* passed her hoses on board. Between 9½ A.M. and 10 A.M. the *Llandovery Castle*, with the assistance of the *Lady Brassey*, was brought into the harbour and by the afternoon the fire was out. The *William Gray* remained near the *Llandovery Castle* while she was at anchor near the pier, and accompanied her into harbour, and after the *Llandovery Castle* was moored, the *William Gray* was told that she was no longer required, and she got back to her berth soon after 9 A.M. Early in the morning she had carried a letter from Captain Iron to the Admiral and returned. She had had her hoses ready in case they were needed.

I have stated the whole of what the *William Gray* and her master and crew did. As far as actual assistance goes, she did nothing except that she took out Captain Iron. The guidance to the westward of the Admiralty pier was not for the safety of the *Llandovery Castle*, but for the safety of

the harbour, and involved no difficulty of any sort. The letter had nothing to do with the safety of the *Llandovery Castle*. The *William Gray* took out Captain Iron, and went out by orders of the Admiralty in response to the wireless message from the *Llandovery Castle*, and stood by for some seven or eight hours in case she was wanted. The *Lady Brassey* was amply sufficient to put out the fire. Except in taking out Captain Iron, the *William Gray* did nothing which, on the most favourable view, can be regarded as actually contributing to the safety of the *Llandovery Castle*. No doubt she went out and stood by, and it may be said that that was done at request.

But where a tug is in the employment of the Admiralty, engaged to do whatever is required of her, and she is required to proceed to a ship in case she is wanted, and in fact does not actually contribute to the safety of the ship, I find it difficult to say that she has rendered a salvage service to the owners of the ship. If it be a salvage service, it would, in this case, be rewarded by a very small sum, and the share of the master and crew would be very small indeed.

It is, however, unnecessary to decide this question, for the claim is barred unless the case is one in which I ought to extend the time, and I am clearly of opinion that there are no sufficient grounds for depriving the defendants of the protection given them by s. 8 of the Maritime Conventions Act, 1911.

The service was rendered on December 7, 1916. The *Llandovery Castle* was sunk by the enemy in July, 1918. The first intimation of a claim was on November, 23, 1918, and, after correspondence between the solicitors, it was, on January 18, 1919, definitely repudiated. The writ was issued on April 2, 1919. It was in form a writ in rem, and was sent by the plaintiffs' solicitors to the defendants' solicitors for acceptance. The defendants' solicitors indorsed it, "We accept service and undertake to appear for the defendants in due course," and they wrote: "We presume you are aware that the *Llandovery Castle* has been lost." Appearance was entered on April 14, 1919. There was, of

1920

THE LLANDOVERY CASTLE.

HILL J.

course, no res, and no bail was asked for or given. The statement of claim prays that the defendants "be condemned in such amount of salvage as to the Court shall seem fit."

I mention the facts as to the writ and appearance, because some argument was based upon the writ being a writ in rem. It is, in my opinion, immaterial whether it was in rem or in personam. The defendants might have refused to accept service of the writ in rem, and have refused to recognize the writ as a good writ in personam. They waived that objection, and entered an appearance. By so doing, they placed themselves in the same position as if they had been brought before the Court by a writ in personam: see *The Dictator* (1) and *The Gemma.* (2) But whether they were sued in rem or in personam they had the right which s. 8 gives them. It was contended that the defendants by appearing waived that right. I am unable to follow that argument. The section says—I am leaving out the irrelevant words—"No action shall be maintainable against the owners in respect of any salvage services unless proceedings are commenced within two years of the date when the services were rendered."

If owners are sued after the period of limitation has expired, how are they to raise that defence? The usual way to rely on a defence based on a statute of limitations is to plead the statute. Order XIX., r. 15, provides that "the defendant must raise by his pleading all matters which show the action or counterclaim not to be maintainable . . . . as for instance . . . . Statute of Limitations." Sect. 8 is a statute of limitations. About that there is no doubt. If there be any doubt, see *Gregory* v. *Torquay Corporation* (3), which deals with the Public Authorities Protection Act and the limitations contained in it. The proviso to s. 8 enables, and in one set of circumstances directs, the Court to extend the period. The practice of the Court has provided a simple way by which the plaintiff or intending plaintiff

(1) [1892] P. 304, 320. (2) [1899] P. 285.
(3) [1912] 1 K. B. 442.

can, before he begins or proceeds with his action, apply to the Court to determine whether the period shall be extended. But if the plaintiff does not so apply and issues his writ, how can the fact that the defendant appears to the writ deprive the defendant of the defence which the section gives him? Suppose the defendant could raise the defence by some form of interlocutory application, what is there to prevent him from raising it by his pleading? There is nothing. If his so doing is inconvenient to the plaintiff, the plaintiff has only himself to thank for neglecting to ask the Court to determine the matter at the first stage.

There remains the question of whether the plaintiff is entitled to an extension, or, if not, whether the Court, in its discretion, ought to grant an extension. The proviso to s. 8 contains two branches. The first is discretionary, and the second compulsory. The second branch of the proviso is inapplicable to the present case. The power under that—the compulsory branch—can only be exercised in order to give reasonable opportunity of arresting the ship, and, as a matter of fact, in this case there is no possibility of arresting the ship because she has been lost. On the first—the discretionary—part of the proviso, the section fixes a period of two years, and the discretion can only be used in favour of a plaintiff if there are special circumstances which create a real reason why the statutory limitation should not take effect.

I am unable to find any special circumstances here. The plaintiffs were, at all times, stationed at Dover, and could have instructed solicitors at any time. If they were waiting for the owners of the tug to take proceedings, they could have easily ascertained the owners' intentions long before the end of two years. If they expected a reward from the Admiralty and have been disappointed in getting it, that is no reason why the owners of the *Llandovery Castle* should be deprived of the protection which s. 8 gives to them. The defendants are the Union-Castle Line, upon whom a writ in personam could at any time have been served. If it is said that a letter was written just before the expiration

1920

THE LLANDOVERY CASTLE.

Hill J.

of two years, the answer is that liability was definitely repudiated on January 18, 1919, and no explanation at all is given for the further delay of over two months before the writ was issued. Moreover, I think the fact that the claim is, at best, a trifling one, is one of the considerations which should be taken into account.

I see no reason for exercising a discretion in the plaintiffs' favour, and I refuse to do so. The action is statute barred, and must be dismissed with costs.

Solicitors for the plaintiffs: *Pattinson & Brewer.*
Solicitors for the defendants: *Parker, Garrett & Co.*

E. C. T.

1920

Jan. 13, 15, 20, 21; *Feb.* 10.

[DIVORCE.]

BUTTERWORTH *v.* BUTTERWORTH AND ENGLEFIELD.

COLLINS *v.* COLLINS AND HARRISON.

BARRATT *v.* BARRATT AND FOX.

HOWELL *v.* HOWELL AND WALKER.

ADAMS *v.* ADAMS AND WARD.

ELLWORTHY *v.* ELLWORTHY AND LEDGARD.

Divorce—Practice—Husband's Claim for Damages and Costs against Co-respondent—Measure of Damages—Grounds for awarding Costs—Value of Wife—Conduct and Means of Co-respondent—Effect of Co-respondent's Ignorance that Respondent was a married Woman—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 33.

Claims for damages in divorce are, by the Matrimonial Causes Act, 1857, s. 33, to be tried on the same principles and in the same manner as actions for criminal conversation, which were abolished by the Act, were tried at common law. This action was originally considered technically to lie in trespass, and, therefore, the husband was only

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

required to prove the fact of adultery, not to prove special damage. But the action either was, or soon came to be, in substance an action on the case. Thus in divorce a jury could from the first find that the adultery was proved but the husband had sustained no damage.

The damages, if any, have always been compensatory only, and not exemplary or punitive. The grounds on which damages are given are: (1.) the actual value of the wife lost; (2.) compensation to the husband for the injury to his feelings, the blow to his honour, and hurt to his family life.

The value of the wife has two aspects: (1.) pecuniary, and (2.) what may be called the consortium aspect; (1.) depends on her fortune and her ability and assistance in the home or business; (2.) depends upon her character and abilities as wife or mother.

The conduct of the adulterer has little bearing on (1.), but may be very relevant as to (2.), as an aid to estimating the value of the wife, e.g., the ease with which he effected his purpose may show that the wife was of small value.

His conduct may also be relevant in estimating the injury to the husband's feelings.

The husband's own character and conduct are, on a claim for damages, as fully in issue as that of his wife.

The amount of compensation cannot depend on the wealth or poverty of the co-respondent, but the way in which he has used his wealth in gaining his end may be relevant in the same way as his conduct generally.

Both the rank and the fortune of the co-respondent are relevant for consideration in so far as either may give assistance in ascertaining the value of the wife, or measuring the extent of the injury inflicted on the husband. Moreover general evidence may be given as to a co-respondent's rank and fortune, because to give damages which it is impossible for the co-respondent to pay might defeat the aim of giving any.

As a matter of strict law the Courts can give damages against a co-respondent who was ignorant that the respondent was married, but it is against sound practice to do so, because (1.) the balance of authority is against it; (2.) such damages savour of a punitive character; (3.) a wife who passes herself off as a single woman may well be deemed valueless; (4.) to give damages in such a case conflicts with the practice of the Court as to costs.

As to costs: The Court has always had a discretion, but it is too late to question the long-established practice that they should not be given against a co-respondent who has no knowledge. The burden of proving knowledge has always, perhaps regrettably, been thrown on the petitioner, but this also is settled practice.

ALL these six cases, which came on before McCardie J. on the dates above mentioned, were husbands' petitions for divorce on the ground of their wives' adultery with named co-respondents, aganist whom they claimed damages and costs. In each case McCardie J. found the adultery proved,

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

and granted a decree nisi, but reserved the question of damages and costs for further consideration. The causes were all undefended.

W. O. Willis, R. R. Ludlow, Beddington, W. O. Willis, Hon. Victor Russell, and *Cotes-Preedy* for the several petitioners.

It is thought that the arguments sufficiently appear from the judgment.

Feb. 10. McCARDIE J. delivered the following considered judgment. In each of the six undefended cases now before me, I granted the husband a decree nisi by reason of his wife's adultery.

In each case the petitioner asked for damages and costs against the co-respondent. This was the first time I had been called upon to assess damages in divorce proceedings or to consider the question of costs in connection with the award of damages. I therefore reserved my decision on both points. The matters at issue are of great importance and constant recurrence, and the relevant authorities reveal a striking conflict of opinion as to the principles to be applied and the considerations to be regarded. Hence I desired to consider the arguments.

Up to the passing of the Juries Act, 1918, questions of damages were necessarily decided by a jury, whilst costs were always determined by the Court. The view of a jury as to damages did not necessarily agree with the view of a judge as to costs. But in the great majority of cases since the passing of the Act a judge alone deals with damages as well as costs, and the double function suggests that the time has arrived to review, and, if possible, to reconcile the authorities.

I shall not set out the detailed facts in the six cases; they vary greatly. It is better that principles should not be obscured by circumstances. At the conclusion of this judgment, therefore, I shall merely indicate the broad results at which I arrive upon each petition.

The powers of the Divorce Court to award damages for

adultery rests on s. 33 of the Matrimonial Causes Act, 1857, which Act abolished the old action of criminal conversation. But s. 33 provided that the claim made for damages on the petition of the husband should be tried by a jury on the same principles, in the same manner and subject to the same rules and regulations as actions for criminal conversation were tried at common law. It further provided that the Court should have power to direct in what manner such damages should be paid or applied, and to direct that the whole or any part thereof should be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife. This latter provision (be it observed) leaves it to the Court to decide the portion of the awarded damages which is to go to the petitioner himself. The provision is curious in view of the fact that in actions for criminal conversation the damages were deemed to be given to the husband as compensation for the injury suffered by him. The breadth of s. 33 was greatly modified by the decision of the Court of Appeal in *Bernstein* v. *Bernstein* (1), which decided that the claim for damages must fail if the claim for a decree nisi itself failed, e.g., by reason of condonation; and so also if the petition claimed damages only. If a suit for dissolution founded on the adultery in question fail, then again the claim for damages falls to the ground: see *Cox* v. *Cox and Warde* (2); *Stocker* v. *Stocker, Brice and Patterson* (3). Excluding then the cases which fall within *Bernstein* v. *Bernstein* (1), and excluding also the specific provision of s. 33 as to the allocation of awarded damages, it is clear that the claim to damages is to be tried as if in an action for criminal conversation. Hence it is essential to consider that form of action. It must be carefully distinguished from the common law action which lay either for knowingly seducing away a wife from cohabitation with the husband, or for harbouring a wife after notice that she had left her husband without his consent. Forms of pleading in the latter class of action are given in Bullen and Leake's Precedents on Pleading, 3rd ed.,

(1) [1893] P. 292. (2) [1906] P. 267.
(3) [1917] P. 264.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

(1868), p. 340. It is essential in such actions to allege that a defendant knew that the woman was married. It seems clear from the famous case of *Winsmore* v. *Greenbank* (1) that those actions are founded not in trespass, but in case, and that the plaintiff must prove actual loss.

The above two classes of action apparently remain in existence at the present day: see Addison on Torts, 8th ed., p. 858, and *Smith* v. *Kaye* (2), per Wright J. The basis is that the husband has the right to the service and society of his wife, just as a father has the right to the service of his children. It is proper to observe that no damages can be obtained for the harbouring of a wife against a husband's will, if the latter has been guilty of misconduct causing his wife to leave, or if the defendant acted upon humanitarian motives in the belief that the wife had justifiably quitted the husband's abode: see *Philp* v. *Squire* (3); *Berthon* v. *Cartwright*. (4) Actions by a husband for the loss of a wife's society or services through an assault upon her or through negligence whereby she is physically injured are, of course, well known to the common law. But all these cases are wholly distinct from claims for damages for criminal conversation: see Bullen and Leake's Precedents of Pleadings (1868), 3rd ed., p. 340*n*.

Ere I deal with the action for criminal conversation it is well to point out that it is doubtful if the wife has any right of action against a woman who entices away a husband, or harbours him after his wrongfully quitting the domestic abode. Apparently the law takes the view that the wife has no such right of control or claim to a husband's services as is possessed by the husband with regard to the wife: see Clerk and Lindsell on Torts (1912), 6th ed., p. 245. In *Lynch* v. *Knight* (5) Lord Wensleydale expressly held that no such right of action existed in the wife, although the opinions of Lord Campbell and Lord Cranworth may tend to the contrary view. The reason for Lord Wensleydale's view is concisely

(1) (1745) Willes, 577.
(2) (1904) 20 Times L. R. 261.
(3) (1791) 1 Peake, 114.
(4) (1796) 2 Esp. 480.
(5) (1861) 9 H. L. C. 577.

put by Lush J. in his Treatise on the Law of Husband and Wife, 3rd ed., p. 13, where he points out that "the wife is under the coverture and protection of the husband, but the husband is not under the coverture or protection of the wife."

It may be said that this result sprang from the inability of a wife prior to 1882 to sue at law without the joinder of her husband as a co-plaintiff. This requirement would clearly prevent the commencement of any effective litigation by the wife. But in my view the apparent inability of the wife to bring such an action sprang from the legal doctrine above indicated, that the rights of a husband with regard to the person and society of his wife were different to and far greater than the rights of a wife with respect to the society and person of a husband. In many of the States of North America a different view prevails, and actions by the wife against another woman for alienation of affection and the concomitant wrong of diverting the husband's society and domestic virtues from the wife, are prominent features of the law reports of the various States.

The action for criminal conversation was based on the mere act of adultery. Once a husband could prove such misconduct he could bring his action for damages although he was unable to allege or prove that he had lost the society and cohabitation of his wife. This seems patent from all the old authorities, and specially from the curious case of *Wilton* v. *Webster* (1), where the husband obtained damages from the adulterer although the husband remained in full cohabitation with his wife and only became aware of her infidelity whilst she lay upon her death bed.

In a claim for criminal conversation therefore the matter to be proved was the adultery. Enticing away or harbouring of the wife operated as mere matters of aggravation. It was not necessary to allege or prove in such an action that the defendant knew that the woman was married: see Chitty on Pleadings (1844), 7th ed., vol. ii., pp. 484, 653. This action of criminal conversation was as a general rule framed in trespass, and the misconduct was alleged to have been committed vi et

(1) (1835) 7 C. & P. 198, 202.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

armis: see Comyns' Digest (1822), 5th ed., vol. i., p. 519. The law appeared to have assumed that the wife had no power to consent and therefore that the act was done against her by force. But although technically laid in trespass the action was in substance one upon the case. It possessed the essential features of the latter class of action. This is clear from the cogent and I think unanswerable reasons given in Chitty on Pleading (1844), 7th ed., vol. ii., pp. 484, 653, and Tidd's Practice (1828), 7th ed., vol. i., p. 4.

The importance of this point will become apparent when I consider later whether the Court is bound upon proof of adultery and the grant of a decree nisi to award some damages, however small, to the petitioner. If the claim be one for strict trespass, then nominal damages at least should technically be awarded for the infringement of the husband's right. But if the claim be one merely in case—i.e., for damage actually sustained—then the Court is not bound to award any damages at all unless actual damage be proved. That the action is one not for strict trespass but in case seems reasonably clear from all the authorities. For "the gist of actions of this sort is the loss to the husband of the comfort and society of the wife," which was always inserted in the old declarations as a material and essential allegation: see Shelford on Marriage (1841), p. 390. The action for criminal conversation was really sui generis. It presented unique features.

I may point out that the right of action for criminal conversation existed only in the husband: see Shelford on Marriage (1841), p. 387; and upon the wording of s. 33 of the Act of 1857 it is obvious that it is the husband only and not the wife who can insert a claim for damages in the petition.

The origin of the action need not be traced. It began at a time when the wife was in substance regarded by the common law as the property of her husband. The benefits of her fortune went to him at common law upon marriage. His power of personal control was great. Even her earnings could be seized by him. She was viewed as a child, and was therefore subject to physical punishment at his hands, provided

it was moderate in extent: see Blackstone's Commentaries, (1787), 10th ed., vol. i., p. 444. The statutory relaxation of his power over her fortune and earnings are quite modern: see the Married Women's Property Acts of 1870 and 1882. The diminution of his power of physical control or punishment was gradual, and the decision of the Court of Appeal in *Reg.* v. *Jackson* (1) marked the disappearance of the old and harsh view of a husband's rights over the body of the woman he has taken to wife.

It seems to me, therefore, that the common law found its technical basis for the action for criminal conversation in the strict view it took as to the power of a husband over the person and the property of a wife. As stated at p. 126 of the Report of the Royal Commission on Divorce (1912): "It seems to have been founded on notions of property." But I conceive it well to suggest that beneath this technical and somewhat sordid basis there lay perhaps a cogent moral foundation. The law has ever regarded the sanctity of married life as a matter of grave moment. It may be, therefore, that one of the original objects of the action was to maintain the purity of married life, and to defend the honour of husband, wife and children. The risk of damages might well have been deemed a check to the wanton inclinations of an intending adulterer. Whether the action has achieved its purpose I do not inquire. The matter is one for debate elsewhere. It may perhaps be regarded by many as a strong determent. It will suffice to say that the claim to damages for adultery is peculiar to Anglo-Saxon countries, and (as pointed out in the Royal Commission on Divorce (1912), p. 126) foreigners cannot understand how the English law allows it.

Now, what are the principles on which damages should be awarded? At the outset there arises the question whether the Court is bound, upon proof of the adultery and the grant of a resultant decree, to assess any damages at all against the co-respondent. In my humble opinion the Court is under no such obligation. Sect. 33 requires that claims for damages be tried on the same principles and subject to the same rules

(1) [1891] 1 Q. B. 671.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

as an action for criminal conversation. That action, as I have ventured to point out, was in substance an action on the case. It was not a strict action for trespass. It follows therefore, I think, that the jury were entitled, although adultery was proved, and although the defendant had failed to establish a technical defence (e.g., privity of the plaintiff to the adultery), to find that the plaintiff had suffered no damage at all. This view seems to be agreeable to the trend of the old decisions and text-books. The summing up of Alderson J. in *Winter* v. *Henn* (1) is not, I think, when taken as a whole, really adverse to the view I have expressed. In substance the matter could be put thus. The claim was for actual loss and injury and not for mere trespass. Therefore if loss or injury were not shown, the claim for damages failed.

If then the jury could before 1857 refuse to award damages in an action for criminal conversation, it follows that they possessed the same right when acting in the Divorce Court after 1857, in a petition for compensation for adultery. The point arose shortly before 1862: see *Spedding* v. *Spedding*. (2). In a note to this case it is stated that the Judge Ordinary (Sir Cresswell Cresswell) had told the jury in several cases that if the adultery was proved to their satisfaction, they were bound to assess the damages at some amount however small. I respectfully venture to think that the law was not so, for the reasons I have given. Apparently the ruling of the Judge Ordinary was given on the assumption that the action was one of strict trespass.

This view was apparently taken by the same judge in *Stone* v. *Stone and Appleton* (3), where the jury found a verdict of one farthing damages only.

In *Gardner* v. *Gardner* (4) however (tried before Barnes J.) the jury after hearing evidence as to the irregular, intemperate and violent habits of the wife before she had met the co-respondent, found the adultery proved, but awarded no damages. That this finding was with the approval of that

(1) (1831) 4 C. & P. 494, 498.
(2) (1862) 31 L. J. (P.) 96, note 1.
(3) (1864) 3 Sw. & Tr. 608.
(4) (1901) 17 Times L. R. 331.

distinguished judge is clear from the later case of *Gibson* v. *Gibson and West.* (1) There Barnes P. stated that damages were awarded not to punish the co-respondent for his misconduct, but to compensate a petitioner for the loss or injury he had sustained by that misconduct. The jury found that the respondent and co-respondent had committed adultery, but added that in their view the case was not one for damages of any kind. Thereupon Barnes P. said: "I quite agree." He accordingly granted a decree nisi with no damages. This view seems to fully agree with the opinion of Lord Hannen, who in summing up to the jury in *Darbishire* v. *Darbishire* (2) said: "If a man's wife goes and walks the streets, the husband is not entitled to come here and recover damages against any man who goes and consorts with that woman." See also *Newby* v. *Newby and White* (3) per Jeune P.

I need only add two observations on this point. First, that it is desirable that the discretion of a judge as to damages should be as wide as that of a jury. Secondly, that the discretion of the judge as to costs under s. 34 of the Act of 1857 perhaps renders immaterial the distinction between a finding of nominal damages and a finding of no damages at all.

Assuming then the power of the Court or jury to withhold even nominal damages from the petitioner, even though he proves the adultery and obtains a decree, it is next necessary to consider the principles on which damages should be assessed. A basic question is whether the damages are compensatory only or whether they may be what the law calls exemplary or punitive damages. If the former the powers of the assessing tribunal are far more limited than in a case where exemplary damages may be given. That the damages are at large is clear. This appears from all the decisions and text-books: see, e.g., per Jeune J. in *Evans* v. *Evans and Platts* (4), where he said to the jury: "The matter is entirely for you." But to say that the damages are at large merely avoids the difficulty of deciding whether they are merely compensatory or whether they may be exemplary. The meaning of the phrase

(1) (1906) 22 Times L. R. 361.
(2) (1890) 62 L. T. 664.
(3) (1897) 77 L. T. 142.
(4) [1899] P. 195, 202.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

"exemplary damages" is aptly put in Sedgwick on Damages, 9th ed. (1913), s. 347, where that distinguished author says: "In actions of tort where gross fraud, wantonness, malice or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severe verdict, at once impose a punishment on the defendant and hold him up as an example to the community . . . . damages assessed on this principle are called exemplary, punitive or vindictive damages." The origin of the doctrine of exemplary damages is ably dealt with by Sedgwick in the Treatise just mentioned. The illustrative English decisions are neatly and fully collected in Halsbury's Laws of England, vol. x., pp. 306–7. There it is well said: "Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of restitutio in integrum no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner and vindicate the distinction between a wilful and an innocent wrongdoer. The damages so awarded have been variously called exemplary, vindictive, penal, punitive, aggravated or retributory. Except in the case of breach of promise of marriage, exemplary damages cannot be awarded in an action for breach of contract, since the existence of misconduct cannot alter the rule by which the damages for breach of contract are assessable. Such damages may, however, be awarded in an action for tort, as for instance, assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment." These statements are supported by the decisions cited in Halsbury.

Exemplary damages have been graphically described in the Supreme Court of New Jersey as "a sort of hybrid between an assertion of ethical indignation and the imposition of a criminal fine": *Haines* v. *Schultz.* (1) They were unknown to the Roman civil law, nor are they, I believe, known in Scotland. But they are well established in England,

(1) (1888) 50 New Jersey L. R. 481.

and the authorities cited in Halsbury show that the rule as to exemplary damages applies e.g., to the action for seduction of a daughter. As to that action Wilmot, C.J. said: "Actions of this sort are brought for example's sake, and although the plaintiff's loss in this case may not really amount to 20*s*., yet the jury have done right in giving liberal damages": see *Tullidge* v. *Wade*. (1) Damages given for "example's sake" are clearly punitive or exemplary in nature. In such an action there are really three distinct heads of damage—namely, (a) pecuniary loss; (b) compensation for wounded feelings and injured pride; and (c) a sum of money of a penal nature in addition to the compensatory damage given for either pecuniary or physical and mental suffering: see Sedgwick on Damages, 9th ed. (1913), s. 347.

Now if punitive damages could be given in an action for seduction of a child, I confess that I can see no good reason why they should not have been given in an action for criminal conversation—i.e., for seduction of a wife—if such an action was allowed at all. Both actions seem in essence to rest upon the same footing. Such clearly was the view of Blackstone, who referring to the action for criminal conversation said: "The damages recovered are usually very large and exemplary": Commentaries, iii., 139. So too per Lord Mansfield in *Bird* v. *Barlow* (2), who said: "An action for criminal conversation has a mixture of penal prosecution." In such action damages are recoverable not only for pecuniary loss (which is often minute) but for wounded pride and injured feelings: see Taylor on Evidence, 10th ed., s. 356.

But apparently the action for criminal conversation became conspicuously sui generis, and grew to be subject to particular rules as to damages, distinguishing it from other actions of tort. In none of the text-books, later than Blackstone, (3) is it stated that the damages may be exemplary or punitive: e.g., in Buller's Nisi Prius (1817), 7th ed., p. 26 (b), it is merely

(1) (1769) 3 Wils. 18.
(2) (1779) 1 Doug. 171, 174.
(3) [Quite early in the 19th century Blackstone's editor Christian observed in his note on this passage: "it seems now to be the better opinion that no damages in an action" of this kind "ought to be vindictive."—F. P.]

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.
COLLINS v. COLLINS AND HARRISON.
BARRATT v. BARRATT AND FOX.
HOWELL v. HOWELL AND WALKER.
ADAMS v. ADAMS AND WARD.
ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

stated that—"as the injury is great so the damages given are commonly very considerable." In Selwyn's Nisi Prius, 11th ed. (1849), p. 26, it is said only that—"The damages given by the jury are in general proportioned to the degree of injury." In Tidd's Practice (1828), 9th ed., vol. ii., s. 883, it is said: "Circumstances of aggravation of the injury may therefore operate as an inducement to the jury to give large damages." I can find no case in which the judge told the jury that they might give exemplary or punitive damages in a case for criminal conversation. On the contrary Alderson J. in *Winter* v. *Henn* (1), appears to attach great weight to the actual value of the wife to the husband; and in *Calcraft* v. *Earl of Harborough* (2) Tindal C.J. points out to the jury that actions for criminal conversation were instituted to compensate a husband for the loss of intercourse between husband and wife. So too in *James* v. *Biddington* (3) Alderson B. said to the jury: "In a case of this kind a plaintiff is entitled to so much damages as a jury think is a compensation for the injury he has sustained." And finally Coleridge J. in *Wilton* v. *Webster* (4), said: "The present plaintiff has a right to the full measure of damages that he is fairly entitled to as a compensation for the loss he has sustained; but you ought not to give vindictive damages, or lose your own temper while considering the conduct of others."

It thus appears that, for reasons which I cannot understand, an action for criminal conversation was, at the time when the Matrimonial Causes Act, 1857, became law, apparently regarded as an action in which exemplary or punitive damages were not to be given. Very soon after the Act was passed Sir Cresswell Cresswell pointed out to a special jury in the Divorce Court: see *Comyn* v. *Comyn and Humphreys* (5), that they were to deal with the question of damages as if assessing them in a common law action for criminal conversation. He then expressly told the jury that it was

(1) 4 C. & P. 494.
(2) (1831) 4 C. & P. 499, 501.
(3) (1834) 6 C. & P. 589.
(4) 7 C. & P. 198, 202.
(5) (1860) 32 L. J. (P.) 210.

not their function to punish the co-respondent. Apparently that learned judge applied to a full extent the observations of Coleridge J. in *Wilton* v. *Webster*. (1) The view of Sir Cresswell Cresswell has apparently become the established law of this Court. Thus in *Keyse* v. *Keyse and Maxwell* (2) Lord Hannen said to the jury: "You are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the loss which the husband has sustained." So too in *Darbishire* v. *Darbishire* (3): "The damages given in these cases are in the nature of compensation. . . . . It is not at all your function to punish the adulterer." As a final selection from the decisions I may quote Sir Francis Jeune, who in *Evans* v. *Evans and Platts* (4) said to the jury: "It is not your duty to punish the co-respondent; this Court does not sit as a Court of morality, to inflict punishment against those who offend against the social law." The importance of these rulings will hereafter appear.

I must therefore take it now to be the settled rule of this Court (in spite of heavy verdicts given by certain juries) that compensatory damages only can be given, and that exemplary or punitive damages are not permissible. That it is not the function of the Court to punish adultery as such or to penalise mere sexual immorality as such, seems to be cogently shown by the apparently settled rule (to which I hereafter refer) that costs are not given against a co-respondent who was unaware at the time of his adultery that the woman was married.

But the rule that damages are compensatory only gives rise to further doubt and difficulty when the decisions as a whole are considered. For if punitive damages cannot be given, then in what manner and to what extent is the conduct of the adulterer to be considered.

It is well to recall here the well-known passage from Buller's Nisi Prius (1817), 7th ed., p. 26 (a) and (b). He says: "As to adultery the action lies for the injury done to the husband

(1) 7 C. & P. 198, 202.
(2) (1886) 11 P. D. 100, 101.
(3) 62 L. T. 664.
(4) [1899] P. 195, 202.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

in alienating his wife's affection, destroying the comfort he had from her company and raising children for him to support and provide for. And as the injury is great so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case; the rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependant of the plaintiff or being a man of substance, proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant and her having always borne a good character till then, and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation." The learned author then proceeds to deal with the various heads of mitigation which can be read in the light of recent well-known decisions.

Similar considerations to those named by Buller are indicated by the other well-known text-books already cited, such as Blackstone, Selwyn and Tidd. So too in nearly all the decisions the conduct of the adulterer has been regarded as important. I take an illustration of intermediate date between the old and modern decisions, the summing up of Sir Cresswell Cresswell in *Comyn* v. *Comyn and Humphreys* (1), where he said: "The next topic that is generally considered is what is the position of the defendant; how came he to be introduced? Under what circumstances did he become intimate with the family? Was there anything like treachery in his conduct? That is a legitimate consideration: not that you are to punish the man, but the conduct of the defendant,—the mode in which he proceeds to obtain the affections of the lady,—is important for your consideration." This is a typical summing up, and it is agreeable to the words of Tindal C.J. in *Calcraft* v. *Earl of Harborough* (2), where he said: "Looking also at the conduct of the defendant it is for you to say what damages under such circumstances, the husband is entitled to." Thus it will be seen that such things as treachery, deliberation and wanton attack on

(1) 32 L. J. (P.) 210. (2) 4 C. & P. 499, 502.

family honour are deemed to be proper subjects for a jury's attention.

Still more cogently is it seen that the conduct of the defendant is deemed to be a vital matter when I recall the numerous decisions which indicate that it is most important on the question of damages, as of costs, to ascertain whether or not the defendant knew that the woman he carnally possessed was married. I will refer to these decisions later.

This head of conduct is peculiarly important by reason of the fact that it would seem, at the first view, that the actual injury to a husband may ofttimes be the same whether the adulterer knew or did not know that the woman was married. But if the conduct of a defendant as above stated be important, then it ought to follow as a matter of juristic logic that the damages should vary with the conduct. Thus if his conduct be marked by treachery, wantonness, cruelty, or gross depravity, the damages should be so much the more than if his conduct be free from such circumstances of aggravation.

To give effect, however, to this logical result would be to render the damages punitive or exemplary rather then compensatory. They would vary with the impropriety and gravity of the misconduct.

Now if the rule as to damages is, as already stated, that they are compensatory only, then a method must be found of reconciling the decisions that the defendant's conduct is a vital factor with the decisions that the damages are for compensation only to the person wronged. I confess that the extraordinary conflict of the various authorities has caused me the greatest difficulty. I cannot help feeling that the existing obscurity is largely due to two circumstances. First, that several of the distinguished judges of the past have not always insisted on the fact that damages are to be given as compensation to the husband, rather than to be imposed as a punishment on the adulterer; and, secondly, that the tribunal has been willing in serious cases to approve of the award of substantial damages.

The only way of reconciling the curious clash of opinion

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

is, I feel, to recall the two main considerations upon which damages are to be based. They are these: first, the actual value of the wife to the husband; secondly, the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the serious hurt to his matrimonial and family life.

I take each head briefly; first, as to the value of the wife. This has two aspects—namely, the pecuniary aspect, and the consortium aspect. The pecuniary aspect (which is generally the least important) depends on the wife's fortune: see *Evans* v. *Evans and Platts* (1) per Jeune P.; her assistance in the husband's business: see *Keyse* v. *Keyse and Maxwell* (2), per Lord Hannen; her capacity as a housekeeper and her ability generally in the home. The considerations are concisely given in Sedgwick on Damages (1913), vol. ii., 9th ed., s. 478.

The consortium aspect is broader and depends on the wife's purity, moral character and affection, and her general qualities as a wife and mother. This is pointed out in all the old text-books already cited and also in the modern text-books on Damages, such as Arnold on Damages, 2nd ed. (1919), pp. 226 et seq., and Mayne on Damages, 9th ed. (1919), pp. 584 et seq., where the authorities are well collected and the appropriate considerations are indicated.

Now upon the pecuniary aspect of the value of a wife the adulterer's conduct has but little bearing. This branch of assessment must be decided by the criteria of good sense and experience: see also Sedgwick on Damages (1913), 9th ed., s. 478.

But upon the consortium aspect of the matter the co-respondent's conduct may have the utmost relevance. For this branch depends, as I have said, upon the purity and general character of the wife. If the wife be of wanton disposition or disloyal instincts, it is obvious that the general value to the husband is so much the less. Thus if it be proved that she thrusts herself upon the co-respondent, or lightly yields to his desire, or holds herself out to be a single

(1) [1899] P. 195. (2) 11 P. D. 100.

woman, a conclusion adverse to her general character and therefore to her value will at once be drawn: see per Sir Cresswell Cresswell in *Comyn* v. *Comyn and Humphreys* (1), where he said to the jury: "If a woman surrenders herself very readily to a man, who takes no pains to obtain her affections, or if you have reason to suppose that she has made the first advances, you are to estimate, as far as you can form an estimate in money, the loss the husband has sustained." If on the other hand the co-respondent has only gained his wish by assiduous seduction and by practised artifice, it may well be considered that the moral character and general worth of the wife is an asset of value to the husband.

Upon the question of the consortium value of the wife, the co-respondent's conduct may therefore be important. This view of the matter although not expressly stated in certain of the later decisions seems to me to be one of the two main grounds on which the co-respondent's conduct is relevant to the assessment of damages. It seems moreover to rest on a sound juristic basis and to be fully consistent with the rule that the damages are compensatory only. I think that this juristic basis was intended by Sir Cresswell Cresswell, in *Cowing* v. *Cowing and Wollen* (2), where, after holding that as a general rule evidence of the co-respondent's means was inadmissible, he however suggested that evidence as to the co-respondent's fortune ought to be given where he had used that fortune to seduce the petitioner's wife. The meaning of this suggestion is to be found in the statement by that learned judge to the jury in *Forster* v. *Forster* (3), where he pointed out that if it required the use of a fortune to seduce a wife, it would indicate that she was not lightly to be won, and would therefore indicate her greater value to a husband, as compared with a wife who yielded to the first suggestion of temptation. I think too that this juristic basis was intended by Lord Hannen in *Keyse* v. *Keyse and Maxwell* (4), where he said to the jury: "If he (the

(1) 32 L. J. (P.) 210.
(2) (1863) 33 L. J. (P.) 149.
(3) (1862) 33 L. J. (P.) 150*n*.
(4) 11 P. D. 100, 101.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

co-respondent) did not seduce her away from her husband that makes a very material difference in considering the amount of damages to be given." The same juristic basis was clearly recognized by Lord Hannen in the case of *Darbishire* v. *Darbishire* (1), where he said to the jury: "If a man's wife goes and walks the streets, the husband is not entitled to come here and recover damages against any man who goes and consorts with that woman." So too in *Watson* v. *Watson and Watts* (2) Barnes P. pointed out to the jury that if the co-respondent did not know that the woman was married, and she held herself out to commit adultery, the damages should be reduced to next to nothing, because she was of no value to the husband. The general conduct of the co-respondent, therefore, may give a most direct aid to the ascertainment of the value of the wife. I shall briefly touch on this point again when I deal with the question as to whether or not damages should be awarded against a co-respondent who was unaware that the woman was married.

I must here point out that when a husband claims damages he puts in issue the whole character, conduct and value of the wife: see Selwyn's Nisi Prius (1849), 11th ed., p. 26.

Now the second main head on which the husband can claim damages is, as I have pointed out, the injury to his feelings and the like. This, in cases where damages are legitimately claimed, is usually the graver of the two heads. The importance of it is rightly indicated in all the text-books and in the majority of the decisions. In *Wilton* v. *Webster* (3) Coleridge J. refers to the "shock to the feelings" of the husband. In *Evans* v. *Evans and Platts* (4) Jeune P. graphically describes the usual consequence of adultery.

With respect to this head it is clear that the conduct of the co-respondent is of the greatest importance. The blow to the husband and the shock to his feelings clearly depend to a large extent on the conduct of the co-respondent. It therefore, follows that any feature of treachery, any grossness of betrayal, any wantonness of insult and the like

(1) 62 L. T. 664.
(2) (1905) 21 Times L. R. 320.
(3) 7 C. & P. 198, 202.
(4) [1899] P. 195, 198, 199.

circumstances may add deeply to the husband's sense of injury and wrong, and, therefore, call for a larger measure of compensation.

This fact itself suffices to account for the weight attached in all the old text-books and in all decisions both old and modern to the gravity or otherwise of the co-respondent's conduct. It accounts to a large extent moreover for the importance attached to the question whether or not the co-respondent knew that the woman was married. Thus it will be seen that the general conduct of the adulterers is important and relevant only so far as it bears (a) on the value of the wife; and (b) on the extent to which the husband's feelings and pride have been injured by it. This principle falls into line, therefore, with the principles that the damages are compensatory and not punitive, and with the further principle that the Court does not sit to punish mere immorality. The observations of Barnes J. in *Lord* v. *Lord and Lambert* (1) must, I venture most respectfully to think, be read in the light of the principles I have humbly endeavoured to state.

In passing to the next point which arises, I desire to say that in assessing damages to the husband it seems to be essential that his whole character and conduct and affection should be tested. These matters bear directly not only on the value of the wife, but also upon the question of any shock to his feelings which he may assert to have been caused by the adultery. The character and conduct of the husband is as fully in issue as the character and conduct of the wife. This is clear from the authorities collected in Arnold on Damages (1919), 2nd ed., pp. 227–8, and Mayne on Damages (1909), 8th ed., p. 584. Hence the importance of careful investigation whenever a claim to damages is made. It is obvious, e.g., that the husband's own negligence or harshness of language or cruelty may have destroyed the affection of his wife or sapped her matrimonial fidelity.

I now desire to consider whether or not the Court or a jury in assessing damages are entitled to consider the fortune

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.
COLLINS v. COLLINS AND HARRISON.
BARRATT v. BARRATT AND FOX.
HOWELL v. HOWELL AND WALKER.
ADAMS v. ADAMS AND WARD.
ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

(1) [1900] P. 297, 300.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

or financial position of the co-respondent. This is a question of great practical importance. Several counsel have argued that the pecuniary standing of an adulterer is wholly and always devoid of relevance. After careful inquiry into the authorities I take the contrary view. I find upon this point an apparent conflict of a serious nature between the old and the modern authorities. I use the word "apparent" advisedly. I take the old authorities first.

In Blackstone's Commentaries (1787), 10th ed., vol. iii., 140, it is said that damages "are properly increased and diminished by circumstances, as the rank and fortune of the plaintiff and defendant." So too in Buller's Nisi Prius (1817), 7th ed., p. 26 (b), amongst the considerations as to damages are mentioned, "the condition of the defendant, his being a friend, relative or dependant of the plaintiff, or being a man of substance." Similar statements appear in Tidd's Practice (1828), 9th ed., p. 883, and in Selwyn's Nisi Prius (1849), 11th ed., p. 26. Still more striking is the summing-up of Sir Cresswell Cresswell in the famous case of *Bell* v. *Bell and Marquis of Anglesey.*(1) There he said to the jury: "You have then to consider the position of the parties, the terms on which husband and wife lived together before her adultery broke off their cohabitation, the circumstances under which the adulterer was introduced, and the means he has to pay the damages you may assess." Large damages were awarded against the Marquis of Anglesey.

It is clear beyond doubt that up to 1834 evidence was habitually adduced in actions for criminal conversation not only as to the co-respondent's social position, but also as to his apparent fortune. In that year, however, the case of *James* v. *Biddington* (2) was tried before Alderson B. In the course of the case the learned Baron (after admitting that the practice had been as I have stated) rejected evidence as to specific property possessed by the co-respondent and added: "The amount of the co-respondent's means is not a question in the cause." This is the decision which first clearly suggested that the damages awarded to a husband

(1) (1859) 1 Sw. & Tr. 565, 566 . (2) 6 C. & P. 589.

were not punitive but compensatory. It is also the decision which has led to the grave existing doubt as to the relevance of the co-respondent's means. This dictum of Alderson B. has been apparently adopted by judges for the last thirty years, with the result that it has been constantly stated that the financial position of the adulterer has no bearing on the question of damages. Thus in *Keyse* v. *Keyse and Maxwell* (1) Lord Hannen told the jury that "the means of the co-respondent had nothing to do with the question." In *Darbishire* v. *Darbishire* (2) the same learned judge said: "The co-respondent's means must be left entirely out of the question." So too in *Bikker* v. *Bikker* (3) Jeune P. said that the "means of the co-respondent are irrelevant." How then are the old authorities and practice to be reconciled with the modern decisions? It seems to me that the apparent conflict has arisen through confusing two distinct things—namely, the mere existence and extent of the co-respondent's fortune as distinguished from the mode in which he has employed it or allowed it to operate in connection with the seduction of the wife. Let me assume that the jury have decided on a proper amount as a compensation to the husband (a) for his pecuniary loss, and (b) for the injury to his feelings and family life. In such a case the damages, as a matter of strict law, should be neither greater nor less as the co-respondent happens to be a rich man or a poor man. A poor man cannot by the plea of poverty escape for the actual injury he has caused. A rich man should not, merely because he is a rich man, be compelled to pay more than a proper compensation to the husband. This follows from the rule that the damages are not punitive but compensatory. The cogent passage in Mayne on Damages (1909), 8th ed., p. 53, (4) cannot prevail in view of the present state of the authorities. His suggestion that the penalty should be proportioned to the means of the offender was based on the opposite assumption.

But even though the fortune of the adulterer is, merely of itself, immaterial, it by no means follows that the mode

(1) 11 P. D. 100, 102.
(2) 62 L. T. 664.
(3) (1892) 67 L. T. 721.
(4) Omitted in 9th ed., 1920.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

in which that fortune is employed is equally immaterial. On the contrary I conceive that it may have the most direct bearing on the question of damages. First, because it may assist in ascertaining the value of the wife; and, secondly, because the mode in which the adulterer may employ his fortune in seducing the wife, may greatly accentuate the outrage to the husband's feelings and the blow to his honour and family pride. The mode in which a co-respondent has used his wealth forms part of his conduct, and that conduct may aggravate the injury to the husband. I conceive that this is the true explanation of the passages I have referred to in Blackstone, Buller, Tidd and Selwyn. Nor do I think that the law as I have ventured to state it is really opposed to the dicta of Lord Hannen and Sir Francis Jeune already cited. I feel that they meant to say only that when once the proper amount of damages is reached it should not be diminished or increased by the poverty or the wealth of the adulterer.

To illustrate the bearing of the co-respondent's fortune or conduct upon the injury to the husband's feelings, let me take the case of a man who deliberately seduces a previously virtuous wife by the gift of large sums of money or of costly jewels or clothes. Here the blow to the husband is great and differs much from the case where a man of small means has been led, by the artifices of the wife, into an illicit intimacy with her. Surely the injury to the husband would be greater in the former case than in the latter. I cannot help thinking that Sir Cresswell Cresswell was right when in *Forster* v. *Forster* (1) he pointed out to the jury that if it required the use of a fortune to seduce a wife, it would indicate that she was not lightly to be won and would therefore indicate her greater value to a husband, as compared with a wife who yielded to the first suggestion of temptation. I think he might correctly have added that the use of a fortune may in many cases accentuate the outrage on a husband's feelings.

It is impossible to sever the question of a co-respondent's fortune from that of his rank or social position. The two

(1) 33 L. J. P. 150*n*.

things stand, I think, together. In practically every authority the social position of the adulterer is treated as a relevant and sometimes as an important factor. This is so from the Treatise of Blackstone down to the present day. Thus Blackstone (1787), 10th ed., vol. iii., p. 140, mentions the "rank and fortune of the plaintiff and defendant" as material circumstances; whilst Sir Henry Duke P. in *Burne* v. *Burne and Helvoet* (1) says: "Common sense tells me that I must bear in mind the general position and obligations of the parties." The only exception appears to be *Bikker* v. *Bikker* (2) where Jeune P. appears to have asked the jury to disregard both the means and "the position in life" of the co-respondent. But if the social position of the adulterer be material, why not his fortune? The one is usually closely allied to the other. Both aspects of the matter are illustrated by the case of *Bell* v. *Bell and Marquis of Anglesey*. (3) There Sir Cresswell Cresswell (in his summing up to the jury), after referring to the position of the parties and the fortune of the co-respondent, added: "on the other hand you have the Marquis taking advantage perhaps of the prestige of his rank in making a vain woman false to her duty to her husband." In my opinion both the rank and the fortune of the co-respondent are relevant for consideration in so far as either may give assistance in ascertaining the value of the wife or measuring the extent of the injury inflicted on the husband.

If, however, neither rank nor fortune have effected in any way the seduction of the wife, then they should I presume be deemed irrelevant. This I conceive explains the dictum above cited of Jeune P. in *Bikker* v. *Bikker*. (2) It is consistent, I hope, with the rule which rejects evidence of specific means possessed by the adulterer. This latter rule was first established by Alderson B. in *James* v. *Biddington*. (4) It was recently recognized by Sir Henry Duke P. in *Burne* v. *Burne and Helvoet* (1), where he said: "It is clear that I must not receive evidence of particular means or profits of the co-respondent." The rule laid down by Alderson B., and

(1) 33 L. J. (P.) 17, 19.
(2) 67 L. T. 721.
(3) 1 Sw. & Tr. 565.
(4) 6 C. & P. 589.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

now adopted, is perhaps convenient, inasmuch as an opposite practice might involve a considerable body of evidence in many cases to the waste of time and to the risk of much irrelevance. General evidence can only, I conceive, be given as to the co-respondent's fortune, and such evidence is restricted to cases where his means or assets may bear upon the value of the wife or the circumstances of seduction and the consequent injury to the husband. I may mention that in several of the States of North America, e.g., in Illinois (where the damages in an action for criminal conversation are regarded as punitive), a different rule prevails, and evidence both general and specific may be offered as to the co-respondent's fortune: see, e.g., *Peters* v. *Lake*. (1)

I now come to the question of whether or no damages should be given against a co-respondent for adultery with a woman not known to be married. That such damages may in strict law be given seems clear, provided that the husband can show some injury. This follows from the principle that in the old actions for criminal conversation it was not necessary to prove or even allege that the co-respondent knew the woman to be married: see Chitty on Pleading (1844), 7th ed., pp. 484, 653; see also *Calcraft* v. *Earl of Harborough* (2); *Lord* v. *Lord and Lambert*. (3) It ought therefore to have followed, I think, that the onus rested on the co-respondent to prove as a matter of mitigation that he did not know that the woman was married, rather than on the petitioner to prove that the co-respondent possessed such knowledge. But here again, for some reason which I do not follow, it has been continually held in recent years that the husband (if he desires to claim damages on the footing that the adulterer had knowledge) must prove such knowledge affirmatively. This rule was strongly stated by Barnes J. in *Lord* v. *Lord and Lambert* (3), and is now the established rule of the Divorce Court. By cogent analogy it is, of course, supported by the rule that costs are not given against a co-respondent unless the petitioner proves knowledge against him.

(1) (1872) 66 Ill. 206. (2) 4 C. & P. 499, 501.
(3) [1900] P. 297.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

Assuming then that as a matter of strict law damages other than nominal can be given against a co-respondent who is wholly without knowledge, the question arises whether as a matter of sound practice and good sense such damages ought to be given? In my opinion the answer is, No. To answer otherwise would produce the extraordinary result that damages—i.e., the substantial matter—would be given against the co-respondent, whilst costs, which should be ancillary to and generally dependent on damages, would, in accordance with the practice of the Court, be refused. This result is opposed, I think, not only to good sense, but also to sound juristic principles. The question of damages against a co-respondent without knowledge cannot, without a grave measure of confusion and inconsistency, be severed from the question of costs in such a case. I will, hereafter, refer specifically to the question of costs.

My view that damages should not be awarded against a co-respondent wholly without knowledge that the woman is married seems to be supported by strong authority. In *Darbishire* v. *Darbishire* (1) Lord Hannen, after stating that damages are compensatory only, said: "If the man does not know that the woman with whom he commits adultery is a married woman, then he is not consciously committing wrong to any man, and is not liable in damages; and so far is that doctrine carried that this Court never even gives costs against a co-respondent who is proved not to have known that the woman was married, because he is only the unconscious instrument with which the wife carries out her wrong against her husband." This is an emphatic statement, and still more emphatic is the language in *Newby* v. *Newby and White*. (2) There a co-respondent did not in his first intimacy know that the woman was married, but afterwards acquired such knowledge and continued the adultery. In that case a counsel of great experience argued: "I cannot get damages, yet I ask for costs." The judgment of Jeune P. is given in four lines: "The law is, to my mind, quite clear. The co-respondent cannot be condemned in costs any more than

(1) 62 L. T. 664. (2) 77 L. T. 142.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

he could be ordered to pay damages. There will be a decree nisi, but no costs."

Such appears to have been the established view of the Divorce Court down to *Lord* v. *Lord and Lambert* (1), and until this case I can find no reported decision at all which disturbs the rule. I think that *Lord* v. *Lord and Lambert* (1) requires careful consideration. It has often been quoted as an authority for the proposition not only that damages may in law be given against a co-respondent without knowledge, but also that such damages are in accordance with the practice of the Court. I cannot agree to this view. It is to be observed that in *Lord* v. *Lord and Lambert* (1) the co-respondent did not concede his liability to pay damages, but offered as a matter of grace to pay 100*l.* on account of any expenses which the petitioner had been put to and which would not be allowed on taxation of costs. The jury accordingly assessed the damages at 100*l.* only, and gave nothing more than the amount which the co-respondent had offered to pay. Barnes J. refused to give costs against him. The summing up of Barnes J. in that case is unusual. He adopts a great part of the language of Lord Hannen in *Darbishire* v. *Darbishire* (2) (but without referring to that decision), yet he quite omits that part of Lord Hannen's language which pointed out to the jury that damages should not be given against a co-respondent without knowledge. In so doing he also overlooked the view of Jeune P. in *Newby* v. *Newby and White.* (3) In *Watson* v. *Watson* (4), however, Barnes P. seems to have supplied the observations which he had omitted in *Lord* v. *Lord and Lambert.* (1) I may say that in *Venables* v. *Venables and Wheeler* (5), the attention of Horridge J., who acted on his view of *Lord* v. *Lord and Lambert* (1), was not called to the circumstances of that case, or to the other decisions I have mentioned. The damages in that case were, of course, assessed by the jury, and not by the judge. I am not aware of any case in which a judge

(1) [1900] P. 297.
(2) 62 L. T. 664.
(3) 77 L. T. 142.
(4) 21 Times L. R. 320.
(5) (1916) 114 L. T. 566.

sitting without a jury has given damages against a co-respondent wholly without knowledge. I therefore humbly venture to think that the practice of a judge should be not to award damages against a co-respondent who is without knowledge. The main reasons may be stated as follows: First, because of the strong balance of authority; secondly, because damages in such a case may well savour of mere punishment for ordinary immorality; thirdly, because a wife who for the purposes of adultery passes herself off as a single woman may well be deemed valueless; fourthly, the grant of damages in such a case would be gravely and regrettably inconsistent with the established rule that costs are not given against a co-respondent wholly without knowledge. If a man's conduct does not call for the minor burden of costs, I do not see how it can call for the major burden of damages.

In suggesting the above practice I desire to point out that a great distinction may well be drawn between cases where the co-respondent has been without knowledge at the time of each of the adulteries alleged, and cases where though without knowledge at the commencement of his adulterous intercourse he yet continues that intercourse after knowledge that the woman was married.

This distinction is also of importance in considering the question of costs. In *Sweeting* v. *Sweeting and Rowlands* (1) Shearman J. gave 50*l.* damages against the adulterer who continued his intimacy after knowledge. Incidentally I may observe that the judge took into account the position and (undoubtedly therefore) the means of the co-respondent in assessing damages. But he refused to give costs against him. I offer no comment on this case, except to say that it illustrates the unfortunate result (which Shearman J. regretted) of having one rule as to damages and another rule as to costs; for damages were apparently given against the co-respondent in *Sweeting* v. *Sweeting and Rowlands* (1) because he did not desert the woman upon discovering that she was married, whilst costs were refused against him because he could not properly be expected to desert her, and therefore

(1) (1919) 36 Times L. R. 15.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

should not be ordered to pay costs within the broad rule laid down by Sir Francis Jeune in *Bilby* v. *Bilby and Harrop*. (1) For it can scarcely be thought that Shearman J. gave damages in respect of the adultery which was without knowledge, whilst withholding damages in respect of the adultery which was with knowledge. If the case is not one for costs, surely it cannot be one for damages.

In the important case of *Burne* v. *Burne and Helvoet* (2) before Sir Henry Duke P., the co-respondent committed misconduct at first without knowledge. The petitioner forgave his wife for that misconduct. Thereafter, however, the co-respondent with full knowledge committed adultery again under discreditable circumstances. Hence Sir Henry Duke awarded substantial damages and also costs against the co-respondent for the reasons given in his cogent judgment.

These two decisions seem consistent with the general rule I have ventured to suggest—namely, that no damages should be awarded by a judge against a co-respondent without knowledge. The verdict of a jury as to damages may sometimes be inconsistent with the view of a judge as to costs. But a judge who sits to deal with damages and costs alike will usually seek to avoid inconsistency.

The final point I desire to deal with is the question of costs against a co-respondent. This matter, as I have already pointed out, is clearly associated with many aspects of the question of damages.

Under s. 34 of the Matrimonial Causes Act, 1857, the matter of costs against a co-respondent is within the discretion of the Court. Within a short time after the passing of the Act the question of costs arose in a case where the co-respondent was without knowledge that the woman was married. This was the case of *Teagle* v. *Teagle and Nottingham* (3), heard before a strong Court consisting of Cockburn C.J. and Wightman and Cresswell JJ. The Court ruled that as the petitioner had not proved knowledge against the co-respondent, no costs should be given against the latter. This decision

(1) [1902] P. 8. (2) Ante, p. 17.
(3) (1858) 1 Sw. & Tr. 188.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

is basic. It is the foundation of all the later practice of the Court upon the point. It clearly established, in my opinion, two things: first, that the onus of proving knowledge rested on the petitioner; secondly, that the Court did not sit to punish mere immorality.

As to the first, I beg most respectfully to say that in my view the decision was perhaps unfortunate. The onus of disproving knowledge might well have been placed on the adulterer. To place the onus of proving knowledge on the petitioner was to put upon him a burden which in many cases could clearly not be met.

As to the second, I beg again to say that without imposing the burden of damages upon an adulterer without knowledge it might well have been held that the man whose act caused the petitioner to seek a dissolution should pay the costs of the appropriate proceedings. But it is too late to question the decision of that distinguished Court. It has created the practice of the Divorce Court on the matter: see the practice stated per Hill J. in *Norris* v. *Norris and Smith*. (1)

Teagle v. *Teagle and Nottingham* (2) was followed in 1860 by another strong Court (namely, Sir Cresswell Cresswell, Channell B. and Keating J.) in *Priske* v. *Priske and Goldby* (3), where Keating J. stated the rule to be a strict one. Apparently the rule was followed without challenge until 1889, and was applied even to cases where an intimacy commenced without knowledge was continued after knowledge. But in 1889 the case of *Learmouth* v. *Learmouth and Austin* (4) came before Butt J. There the co-respondent formed an intimacy with the woman, not knowing that she was married. Afterwards he learned that she was a wife, and yet continued the intimacy. Butt J. said that in such a case the adulterer should as general rule be ordered to pay the costs, but on the special facts he gave no costs against the co-respondent. The learned judge doubted *Priske* v. *Priske and Goldby*. (3) But apparently he failed to observe that that case was decided

(1) [1918] P. 129, 130.
(2) (1858) 1 Sw. & Tr. 188.
(3) (1860) 4 Sw. & Tr. 238.
(4) (1889) 62 L. T. 608; 59 L. J. (P.) 14.

1920

BUTTERWORTH v. BUTTERWORTH AND ENGLEFIELD.

COLLINS v. COLLINS AND HARRISON.

BARRATT v. BARRATT AND FOX.

HOWELL v. HOWELL AND WALKER.

ADAMS v. ADAMS AND WARD.

ELLWORTHY v. ELLWORTHY AND LEDGARD.

McCardie J.

by three judges and that it was in full consonance with the earlier and weighty case of *Teagle* v. *Teagle and Nottingham*. (1) The true ground for Butt J. to take was, I conceive, that in *Learmouth* v. *Learmouth and Austin* (2) the adulterer did commit misconduct with knowledge, although his earlier intimacy was without knowledge. Hence the facts were clearly distinguishable from those in *Teagle* v. *Teagle and Nottingham* (1) and *Priske* v. *Priske and Goldby*. (3) Now, *Learmouth* v. *Learmouth and Austin* (2) marked the beginning of a line of cases which, though perhaps consistent with *Teagle* v. *Teagle and Nottingham* (1), and with the wide discretion of the Court under s. 34, are not wholly consistent with each other.

The central decision for consideration is *Bilby* v. *Bilby and Harrop* (4), where Jeune P. said: "The rule laid down by my predecessors is fair and proper enough, that where a co-respondent has found out, when too late to repair the wrong done, that the woman with whom he has taken up is a married woman, he ought not, because he does not then desert her, to be held liable for costs." This it will be observed is a broad modification of the general rule as to costs suggested by Butt J. in *Learmouth* v. *Learmouth and Austin* (5) with regard to a co-respondent with knowledge. I conceive that this modification, with which I venture to fully agree, applies to cases where, before knowledge, the co-respondent has taken up abode with the wife, or where the wife has become dependent upon him, or where the circumstances are such that a fair-minded man would say that the co-respondent ought not to abandon or desert the woman. It is always important to know whether the husband was willing to take her back or not.

Each such case depends on the special circumstances, and must be dealt with on the merits: see Barnes P. in *Robinson* v. *Robinson*. (6) Where the circumstances I have mentioned do not exist, then costs will usually be given against

(1) 1 Sw. & Tr. 188.
(2) 62 L. T. 608; 59 L. J. (P.) 14.
(3) 4 Sw. & Tr. 238.
(4) [1902] P. 8.
(5) 59 L. J. (P.) 14; 62 L. T. 608.
(6) [1919] P. 352.

the co-respondent with knowledge, in spite of the fact that an earlier intimacy took place in ignorance that the woman was married. This statement is, it is true, opposed to the observations of Sir Francis Jeune in *Newby* v. *Newby and White* (1), but it is agreeable to the actual decision of the same judge in *Bilby* v. *Bilby and Harrop* (2); and it is, moreover, in full conformity with the judgment of Hill J. in *Norris* v. *Norris and Smith* (3) and with the weighty decision of Sir Henry Duke P. in *Burne* v. *Burne and Helvoet.* (4)

Such are the views which I venture, with the utmost diffidence, to express upon the important points of law and practice which have arisen before me.

I desire to add one further observation only on the question of damages. The temptation is sometimes strong to make them punitive. They may easily become excessive. I conceive that moderation rather than undue severity should be the principle. I think that Shearman J. was right as a matter of good sense (if not of strict law) when in *Sweeting* v. *Sweeting and Rowlands* (5) he took into account, in assessing damages at 50*l.* only, the fact that the co-respondent was but a petty officer in the Navy. I desire to express my respectful concurrence with the words of the President (Sir Henry Duke) in *Burne* v. *Burne and Helvoet* (6), where he said: "Common-sense tells me that I must bear in mind the general position and obligations of the parties and make an award which it will be possible for the co-respondent to meet and which will not defeat its own object." Those words are robust good sense.

The learned judge then, without going further into the facts of each case, dealt with the costs and damages in each separately.

Solicitors for the several petitioners: *Pritchard, Englefield & Co., for Butcher & Barlow, Bury; A. E. Cubison; R. W. White; C. J. Smith & Hudson, for Payne & Payne, Hull; Jerome & Co.; G. A. Baker.*

(1) 77 L. T. 142.
(2) [1902] P. 8.
(3) [1918] P. 129.
(4) Ante p. 17.
(5) 36 Times L. R. 15.
(6) Ante pp. 17, 19.

J. R. B.

1920
Feb. 13, 19,
27,

[DIVORCE.]

CRAMP *v.* CRAMP AND FREEMAN.

Divorce—Condonation—Forgiveness—Evidence—Husband's renewal of Connubial Intercourse with Knowledge of his Wife's Adultery—Verbal Refusal to forgive.

Condonation, as applied to matrimonial offences, though frequently defined as conditional forgiveness, is not forgiveness in the ordinary sense, but would be more properly defined as conditional reinstatement of the offending spouse. It is always subject to the condition that the offence must not recur. Resumption by the husband of connubial intercourse with his wife, when he has full knowledge of her adultery, is conclusive proof of condonation. It cannot be rebutted by the fact that he never forgave her, though that fact is admitted by the wife.

In this case the parties were married in 1906, and lived together until 1916. There were several children. The husband joined the Army in 1916. During his absence the wife committed adultery with the co-respondent, and pregnancy resulted. The husband came home for leave on December 20, 1917. He noticed the pregnancy of his wife, and she confessed her sin. The petitioner then said that she must leave him and that he should divorce her. Within the next few days he took away the children. On December 23 he went to live with his mother and there resided with the children. The next day he stopped the payment of his Army allowance to his wife. From that time forward he paid nothing to her. The wife left his house as a dismissed woman on December 30 and had since then earned her own living. Her child by the co-respondent was born a few weeks after she left. The spouses never met after that date. It was admitted that the husband on several occasions between December 20 and 30 went to see his wife in the daytime, as he said to arrange about the separation. The wife gave evidence that, on the night of December 20 and on each of the subsequent visits of her husband, sexual intercourse took place between them. This the husband denied. The

wife admitted that her husband never forgave her, and that she never asked for forgiveness, or thought she had received it.

After the evidence had been given the case stood over for further argument.

Cotes-Preedy for the respondent and co-respondent. There is no judicial definition of condonation before the Matrimonial Causes Act, 1857, but there are many cases where the difference in the position of the husband and the wife with regard to the resumption of sexual intercourse, after the fault of the other, is dwelt upon; and it is implied, if not absolutely stated, that the resumption of intercourse by the husband amounts by itself to condonation, e.g., *D'Aguilar* v. *D'Aguilar* (1); *Beeby* v. *Beeby* (2); and in *Peacock* v. *Peacock* (3) it is stated that a husband cannot resume sexual intercourse with a guilty wife, when he has full knowledge of the facts, without condoning the offence. In *Keats* v. *Keats and Montezuma* (4) Sir Cresswell Cresswell for the first time gave a judicial definition of condonation—namely, "Blotting out the offence imputed so as to restore the offending party to the same position as he or she occupied before the offence was committed." On appeal this definition was approved by Lord Chelmsford, with the reservation that the words "blotting out" must not be taken literally, because condonation is always conditional on the guilty party not repeating the offence. Again, in *Priske* v. *Priske and Goldby* (5) condonation is defined as "forgiveness which is conditional," and the same view has been taken ever since. It has always been held that condonation cannot be effected by words alone, without reinstatement. And it has never been suggested that a husband who has full knowledge of the facts, can resume sexual intercourse and yet reserve his right to a divorce by mere words so long as the condition is observed. He also cited *Rose* v. *Rose* (6); *Blandford* v.

(1) (1794) 1 Hagg. Ec. 773, 781.
(2) (1799) 1 Hagg. Ec. 789.
(3) (1858) 1 Sw. & Tr. 183.
(4) (1859) 1 Sw. & Tr. 334, 346.
(5) (1860) 4 Sw. & Tr. 238.
(6) (1883) 8 P. D. 98.

1920

CRAMP v. CRAMP AND FREEMAN.

Blandford (1); *Hall* v. *Hall* (2); *Bernstein* v. *Bernstein* (3); *Houghton* v. *Houghton* (4); *Roberts* v. *Roberts*. (5)

Tyndale for the petitioner. None of the reported cases deal with facts similar to those in the present case. The earliest statement of the law on the subject is to be found in Oughton's Ordo Judiciorum, 1728, vol. i., tit. 214, in a passage in mediæval Latin, which is adopted and translated in the Clerks Assistant to Ecclesiastical Practice, 1800, p. 127. It is clear from both statements that forgiveness as well as reinstatement in conjugal rights was a necessary part of condonation; and that the resumption of sexual intercourse is taken only to be valuable as evidence of forgiveness. No doubt it affords a very strong presumption. But it is not irrebuttable, as is shown by the cases in which resumption of sexual intercourse by the woman has been held not to be condonation of her husband's offence: *Snow* v. *Snow*. (6) There could not be stronger evidence to rebut the presumption than the evidence in this case where both parties declare that there was no forgiveness or intention on either side to give or receive forgiveness. He also referred to Lord Coleridge's judgment in *Everett* v. *Everett and McCullum*. (7)

Cur. adv. vult.

Feb. 27. McCARDIE J. This petition compels, with grave directness, an inquiry into the law of condonation. [His Lordship stated the facts as above and continued:] After careful consideration I feel no hesitation in accepting the evidence of the wife. I am satisfied that she was a truthful witness and that connection took place as she asserts. But the evidence of the wife herself gives rise to the difficulty which has led me to reserve my judgment. She states, with conspicuous frankness, that her husband never forgave her. This she admitted twice in the clearest manner.

(1) (1883) 8 P. D. 19, 20.
(2) (1891) 64 L. T. 837; 60 L. J. (P.) 73.
(3) [1893] P. 292.
(4) [1903] P. 150.
(5) (1917) 117 L. T. 157.
(6) (1842) 2 Notes of Cases, Supp. xiii.
(7) [1919] P. 298.

In examination in chief she said: "He did not forgive me although we parted on affectionate terms." In cross-examination she again said: "My husband never forgave me but he had connection with me." In her subsequent letters to her husband she never suggested that she had been forgiven. She accepted the position of a dismissed wife. Upon the evidence before me I am compelled to find that the husband never announced any forgiveness to the wife, but intended throughout to divorce her, and that the wife never asked for forgiveness or believed that she had received it. I use the word "forgiveness" in its ordinary conversational sense. These findings of fact require me to consider the essential features of the law of condonation as administered by this Court.

"Condonation" is a doctrine established by the old Ecclesiastical Courts. The phrase does not occur in the civil law. It was introduced into the English Courts from the canon law. If condonation be established before me, then I am bound by ss. 29 and 30 of the Matrimonial Causes Act, 1857, to dismiss the petition. Now condonation is usually described as the conditional forgiveness of a known matrimonial offence, the implied condition being that no further matrimonal offence shall be committed.

By the matrimonial law of this country the offence of every married person is recorded on tablets which do not perish. If condonation takes place the record is not blotted out but over it is placed an obscuring veil. Until a new matrimonial sin occurs, the merciful barrier to sight remains. If, however, a further offence be committed, then the injured spouse may lawfully raise the veil and point with rigorous finger to the record of offence which had previously been hidden from view. No matrimonial offence is erased by condonation. It is obscured, but not obliterated. It may be revived after many years. Such is the doctrine which has been impressed on the matrimonial law of England, and the principle is one which deepens the duty of continued good behaviour on the part of the spouse who has once offended. This doctrine, I may observe, is not the Christian

1920

CRAMP v. CRAMP AND FREEMAN.

McCardie J.

doctrine of forgiveness. It is wholly different, e.g., from the meaning of the word "forgiveness" in St. Luke, c. vii., v. 47, where the great words appear: "Her sins which are many, are forgiven." Nor is it the lay doctrine of forgiveness. I need only cite the famous line of Pope in his Essay on Criticism, Part II., line 325: "To err is human, to forgive divine."

The doctrine of condonation is peculiar in its origin, peculiar in its features, but perhaps most peculiar in its notion of forgiveness. It seems to me to be vital to remember that the forgiveness of condonation may be a wholly different thing to the forgiveness spoken of by ordinary men and women. As Sir Cresswell Cresswell said in *Dent* v. *Dent* (1): "'Condonation' is a strictly technical word. It had its origin, and so far as I know its entire use, in the Ecclesiastical Courts, and it means 'forgiveness with a condition.'" This notion of forgiveness runs through most of the decisions. Thus in *Peacock* v. *Peacock* (2) Sir Cresswell Cresswell said: "Condonation signifies forgiveness of a conjugal offence with full knowledge of all its particulars." So in *Blandford* v. *Blandford* (3) Lord Hannen says: "She forgave him on condition that he 'sinned no more,' and that is the legal definition of condonation." And in the famous case of *Keats* v. *Keats and Montezuma* (4) the word "forgiveness" continually occurs. Finally I may cite *Ellis* v. *Ellis* (5), where the matter was put by Sir Cresswell Cresswell with a peculiar emphasis when he said: "It is necessary to prove that he took his wife back with the intention of forgiving her, believing her to be guilty."

Now I venture to think, with the utmost diffidence, that the emphatic use of the word "forgiveness" tends to obscure the true meaning of the doctrine of condonation and to treat forgiveness, in the lay or Christian view of that term, as an absolute essential of condonation. In the Oxford Dictionary the meaning of the word "forgive" is said to be: "To

(1) (1865) 4 Sw. & Tr. 105, 107.
(2) 1 Sw. & Tr. 183, 184.
(3) 8 P. D. 19, 20.
(4) 1 Sw. & Tr. 334.
(5) (1865) 4 Sw. & Tr. 154, 157.

give up resentment against, to pardon." Forgiveness in this sense is not, in my humble opinion, essential to the proof of condonation. It is a most important circumstance, but not essential. It will be found, I think, that the truer definition of condonation is that it is a conditional waiver of the right of the injured spouse to take matrimonial proceedings, and it is not forgiveness at all in the ordinary sense. As it is put in Shelford on Marriage, 1841, at p. 446: "Condonation extinguishes the right of complaint, except for subsequent acts, and is accompanied with an implied condition that the injury shall not be repeated, and that a repetition of the injury takes away the condonation and operates as a revivor of former acts." In this passage, it will be observed, the word "forgiveness" does not appear. Perhaps I may use the language of an ecclesiastical jurist and say that condonation is a conditional concession of the jus divortii, or in other words a contingent remissio injuriæ.

Not only is forgiveness, in the lay sense, unessential to condonation but in itself it is not sufficient to prove condonation. This follows from the recent decision of the President in *Crocker* v. *Crocker* (1), where Sir Henry Duke, after a careful examination of *Keats* v. *Keats and Montezuma* (2), and *Bernstein* v. *Bernstein* (3), expressed the view that letters which clearly showed forgiveness were not, unless followed by something in the nature of reinstatement or restoration, sufficient to establish a plea of condonation.

What then is the doctrine of condonation? It will aid an answer to this question if I mention two outstanding features of the doctrine before I deal with the question of forgiveness. In the first place it is necessary that the spouse who condones should be substantially aware of the matrimonial sin committed. There cannot be condonation without knowledge. This is illustrated by the leading case of *Bernstein* v. *Bernstein* (3) where the Court of Appeal held that a husband who condones his wife's adultery (of which

(1) (1920) 36 Times L. R. 216. (2) 1 Sw. & Tr. 334.
(3) [1893] P. 292.

1920

CRAMP v. CRAMP AND FREEMAN.

McCardie J.

he is aware) with one man, does not thereby condone her adultery (of which he is not aware) with another man. This requirement of knowledge however must always be considered in connection with the words of Sir Cresswell Cresswell in *Keats* v. *Keats and Montezuma* (1) where he pointed out that a husband may be in doubt as to his wife's guilt, but may say: "Whether guilty or not I will take her back and she shall be restored to my bed."

Secondly, condonation in the true sense is always conditional, as Sir Cresswell Cresswell puts it in *Dent* v. *Dent* (2): "The rule of law is that all condonation is conditional." This aspect of the matter was not, of course, dealt with by Lopes L.J. in *Bernstein* v. *Bernstein* (3) where he said that: "Condonation means a full and absolute forgiveness." I venture respectfully to point out that this statement suggests the very opposite of condonation, which is essentially conditional and not unconditional. As Lord Stowell had said in *D'Aguilar* v. *D'Aguilar* (4): "Condonation is not an absolute and unconditional forgiveness." This appears from all the authorities, and hence the only question in recent years has been as to the nature of the later offence which will revive the earlier offence: see *Houghton* v. *Houghton* (5); *Copsey* v. *Copsey and Erney* (6); *Price* v. *Price and Brown*. (7) I do not discuss the criticisms on the conditional nature of condonation which are contained in the observations and speeches in the House of Lords in the well-known case of *Collins* v. *Collins*. (8) But I think it well to mention *Rose* v. *Rose* (9) which was referred to in the argument before me. In that case a separation deed with clear and specific covenants was entered into between husband and wife. The Court of Appeal held that the effect of the deed was to constitute what Jessel M.R. called "final condonation." But the decision turned on the special terms of the deed itself and the Court pointed out that in the old Ecclesiastical

(1) 1 Sw. & Tr. 334, 346.
(2) 4 Sw. & Tr. 105, 106.
(3) [1893] P. 292, 303.
(4) 1 Hagg. Ec. 773, 781.
(5) [1903] P. 150.
(6) [1905] P. 94.
(7) [1911] P. 201.
(8) (1884) 9 App. Cas. 205.
(9) 8 P. D. 98.

Courts condonation was never final. In view of the wording of the document it was held that an offence by the husband after the deed does not revive the offence prior to the deed. I conceive that it would have been useless for the wife to assert in that case that she had never actually forgiven her husband. I desire also to mention here the important case of *Rowell* v. *Rowell* (1), to which my attention was called after the arguments in this suit. There the husband and wife entered into the usual deed of separation. Whilst living apart acts of sexual commerce took place. It was held by the Court of Appeal that the fact that intercourse had taken place was not, of itself, conclusive evidence that the separation had come to an end so as to make the deed of no effect. But in that case there was obviously no question of condonation and the Court held upon the evidence that, in spite of their sexual intercourse, the parties never meant to be really reconciled and neither intended that the provisions of the deed should terminate.

Such are two emphatic features of condonation. The grave point before me, however, is whether sexual commerce by a husband with a wife known to be guilty of adultery is to be deemed conclusive evidence of condonation. In order to test this question it seems well to repeat the point that there can be no condonation without something in the nature of reinstatement of the offending spouse. It is clear that sexual commerce is not essential to such reinstatement. This appears from the judgment of Lord Chelmsford in *Keats* v. *Keats and Montezuma.* (2) He says: "It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. But it is obvious, without adducing instances to illustrate my meaning, that that in some cases may be a test wholly inapplicable." By this he meant, I take it, that in some cases physical reasons, e.g., may preclude the presumption of sexual commerce. He went on: "But I am willing to adopt an expression which was happily used by Wightman J. in the course of the argument, and to say that in my judgment

(1) [1900] 1 Q. B. 9. (2) 1 Sw. & Tr. 334, 356, 357.

1920

CRAMP v. CRAMP AND FREEMAN.

McCardie J.

there can be no condonation which is not followed by conjugal cohabitation."

Now in order to see whether forgiveness in the lay sense is essential, I may take the case of a man who has full knowledge that his wife has been guilty of adultery and who says to her, "For the sake of our children you shall remain at the head of my house, you shall manage domestic affairs, you shall appear to the world as my wife, no one shall know that I have discovered your sin, but I cannot forgive you and I will no longer share your bed." Could he, after such a measure of restoration had continued for a substantial period turn to his wife and say, "I will now petition for a divorce for I have never really forgiven you." In my opinion the answer is clearly "No." The absence of the state of mind which is called forgiveness would not outweigh his actual conduct of restoration. The Court would surely look to acts rather than words. For, as Lord Chelmsford said in *Keats* v. *Keats and Montezuma* (1), she would, after the restoration, have continued to live with him "as a wife, although a degraded wife."

Now I conceive that matrimonial cohabitation (which may vary with the circumstances and position of the parties) is merely one form of reinstatement, and even such cohabitation may be of so short a period or of such a nature as not to show condonation. Thus, in *Hall* v. *Hall* (2), a jury (under the direction of Sir Francis Jeune) found there was no condonation where a husband, after receiving a wife's confession of adultery went home with her and occupied the same room for two nights whilst in a state of great mental distress, but then sent her away to her relations, although parting on friendly terms. No sexual commerce took place. Here there was held to be no actual reinstatement or intention to restore. This decision was upheld by the Court of Appeal. (3)

Now if a restoration of conjugal cohabitation as distinguished from sexual intercourse will carry condonation

(1) 1 Sw. & Tr. 334, 357. (2) 64 L. T. 837.
(3) (1891) 60 L. J. (P.) 73.

with it, the question arises as to the effect of sexual commerce by a husband with a wife known by him to be guilty of adultery. This is a question of the first importance and particularly so because I see that in *Roberts* v. *Roberts* (1), Hill J. said this: "In my view the fact that the husband has had intercourse with a delinquent wife is not absolutely conclusive, and does not entirely shut out the inquiry whether there has been that forgiveness and blotting out of the offence which amounts to condonation." I think it will be found that this dictum of Hill J. is to be explained by the fact that in the case he was dealing with the wife had secured marital intercourse from her husband by the false representation that she was not pregnant from the adultery which had become known to the husband. The learned judge was dealing with a case of fraud. I will again refer to this decision later.

I find that the authorities draw a clear distinction between a wife who permits intercourse after knowledge of her husband's adultery, and a husband who has intercourse with his wife after he is aware of her infidelity. As to condonation by a wife, Sir Cresswell Cresswell in *Keats* v. *Keats and Montezuma* (2) says: "With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of a husband in renewing his intercourse with his wife." This passage illustrates the view that the wife may be the passive rather than the active agent in the matter in question. It is in conformity with the older cases of *D'Aguilar* v. *D'Aguilar* (3), *Durant* v. *Durant* (4), and *Turner* v. *Turner*. (5) The point

(1) 117 L. T. 157, 159.
(2) 1 Sw. & Tr. 334, 347.
(3) 1 Hagg. Ec. 773.
(4) (1825) 1 Hagg. Ec. 733.
(5) (1854) 2 Spinks 201*n*.

1920

CRAMP v. CRAMP AND FREEMAN.

McCardie J.

was concisely put by Lord Stowell in *Beeby* v. *Beeby*: (1) "It would be hard if condonation by implication was held a strict bar to the wife. It is not improper she should for a time show a patient forbearance; she may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife;—a woman may submit to necessity." When a woman, therefore, submits to her husband's embraces it is only evidence, strong indeed at the present day, but not necessarily conclusive of condonation: see per Dr. Lushington in *Snow* v. *Snow* (2), and per Lord Penzance in *Newsome* v. *Newsome*. (3)

But the position of a husband is wholly different. As to him Sir Cresswell Cresswell says in *Keats* v. *Keats and Montezuma* (4): "If the husband knowing that his wife had been guilty of adultery, takes her to his bed again, he clearly being his own master in that particular, and quite able to choose for himself, if he is so regardless of the wrong done to him as to take her back again, it is always held that this is such a proof of condonation, that it cannot be got over." Upon the motion for a new trial in *Keats* v. *Keats and Montezuma* (4) Lord Chelmsford said: "The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation." This cogently illustrates the view that the Court looks rather to the acts themselves than to the state of mind or the employment of mere words. As Sir Cresswell Cresswell said in *Keats* v. *Keats and Montezuma* (5): "Certain acts are sufficient in themselves to prove condonation." I deem it clear from *Keats* v. *Keats and Montezuma* (4) that Lord Chelmsford thought that marital intercourse by a husband, after knowledge of the wife's delinquency, was conclusive evidence of condonation. This view seems to be

(1) 1 Hagg. Ec. 789, 795.
(2) 2 Notes of Cases, Supp. xiii.
(3) (1871) L. R. 2 P. & M. 306, 311.
(4) 1 Sw. & Tr. 334, 347.
(5) 1 Sw. & Tr. 334, 356.
(6) 1 Sw. & Tr. 348.

agreeable to the other leading authorities. Thus in Oughton's Ordo Judiciorum (1728), tit. 214, the author treats sexual commerce with a known delinquent wife, as sufficient of itself for condonation. He does not mention the word "forgiveness." So too in *Beeby* v. *Beeby* (1) Lord Stowell says: "Now condonation is forgiveness legally releasing the injury, it may be express or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again unless he had forgiven her." So in Poynter's Law of Marriage and Divorce, 1824, p. 232, it is said: "Condonation is implied if the husband after reasonable knowledge of the infidelity of his wife continues to admit her as the partner of his bed." In *Campbell* v. *Campbell* (2) Dr. Lushington clearly thought that a single act of connection would suffice. He said this: "Condonation is connubial intercourse with full knowledge of all the facts."

Finally it seems reasonably clear from the case of *Hall* v. *Hall* (3) that Lindley L.J. was of the view that although forgiveness was a feature of condonation, yet that it would be conclusively assumed if sexual intercourse took place.

The truth of the matter appears to be that condonation is not conditional forgiveness, but a conditional reinstatement of the offending spouse. The word "forgiveness" in the decisions must, I think, be regarded as employed in a technical sense with the juristic purpose of defining condonation, although I agree that it is frequently used in the judgments in the sense employed by ordinary laymen.

The explanation of the use of the word "forgiveness" as a term of definition is well treated (in the light of English decisions) in Bishop on Marriage and Divorce, 1881, vol. ii., § 36: "Theoretically condonation, like connivance, is in the mind; the question is of interest whether the party meant to forgive. But technical rules have been adopted for

(1) 1 Hagg. Ec. 789, 793. (2) (1857) Dea. & Sw. 285, 288.
(3) 60 L. J. (P.) 73.

1920

CRAMP v. CRAMP AND FREEMAN.

McCardie J.

determining when condonation has passed and they, rather than the abstract doctrine, control the decisions." "Thus the common case illustrative of the active doctrine is where the husband comes into possession of the fact and proof that his wife has committed adultery. Then, if he has marital intercourse with her, the law presumes that he has condoned the offence and refuses him divorce." In § 38 he says this: "When we consider how fully the rights and consequences of marriage are regulated by law, how little is permitted to the parties and especially how absolutely void are all private stipulations for divorce, the result seems inevitable that, in reason, on a question probably not adjudged, the presumption of condonation from cohabitation is, in the circumstances just explained, conclusive; so that it cannot be overcome by showing a concurrent agreement to the contrary. For otherwise the marriage would thereafter be in the parties' own hands to dissolve or not as they might at any time choose contrary to the policy of the law. And in the words of Parsons C.J.: 'It would be injustice to the wife and immoral in the husband to claim and enjoy as his peculiar marital rights the society of his wife, after knowledge of her offence, and afterwards to cast her off for that same offence.'" These are powerful words, and the decision already referred to of Hill J. in *Roberts* v. *Roberts* (1) may perhaps be some day considered further in the light of them, and of such decisions with respect to fraud inducing marriage as *Wakefield* v. *Mackay* (2), *Swift* v. *Kelly* (3) and *Moss* v. *Moss*. (4) The body of rules which govern ordinary contracts cannot be rigorously applied to the grave subject of matrimonial status or to the interests of children whether living or unborn.

A man cannot, I think, use the body of his wife for sexual ends and announce to her at the same time that he will not forgive her adultery, but will present a petition to dissolve the marriage bond. Such acts of intercourse would be immoral unless the woman he embraced be still his wife.

(1) 117 L. T. 157.
(2) (1807) 1 Phil. 134*n*.
(3) (1835) 3 Knapp 257.
(4) [1897] P. 263.

1920

CRAMP v. CRAMP AND FREEMAN.

McCardie J.

If such conduct did not destroy his right to a divorce, then it would follow that he might indulge a sexual commerce with his wife, not only until he presented his petition, but even until the grant of a decree nisi. Grave indeed would be the consequence of an opposite view when it is remembered that a wife might become the mother of a child through the acts of a husband after the discovery of her sin. A man cannot at the same moment exercise the rights of a husband and disclaim the continuance of the marriage bond.

In my opinion, therefore, a husband, who has sexual relations with his wife after knowledge of her adultery, must be conclusively presumed to have condoned her offence. This is the rule of righteousness and I am glad to think it is also the rule of law. To hold otherwise would be a blot on the jurisprudence of this country.

I therefore find in this case that condonation is established, and I accordingly dismiss the petition.

Solicitors for petitioner: *T. H. Horwood & Co.*

Solicitors for respondent and co-respondent: *Peacock & Goddard, for Phillips, Evans & Dalton, Stamford.*

J. R. B.

1920
March 1, 15.

[ADMIRALTY.]

THE MARIE GARTZ.

[1912, fol. 388.]

Admiralty—German Claimants—Right to litigate Claim for Damages—Treaty of Peace between the Allied and Associated Powers and Germany, 1919, *arts.* 296 *and* 297—*Treaty of Peace Order*, 1919, *s.* 1, *sub-ss.* 16 *and* 17.

Before the outbreak of war, the defendants, the German owners of the steamship *M. G.*, recovered judgment against the British owners of the steamship *K.* for the amount of the damage arising out of a collision between the two vessels, and the damages were referred to the Registrar and merchants for assessment. Before the defendants had filed their claim in the registry the war had broken out. A few days before the Peace Treaty was ratified (January 10, 1920) the claim and vouchers were filed, but by consent they were treated as having been filed after the ratification. Thereupon the plaintiffs took out a summons for an order to set aside the filing and service of the claim and vouchers on the ground that under arts. 296 and 297 of the Treaty and s. 1, sub-ss. 16 and 17, of the Treaty of Peace Order, 1919, the parties had no right to litigate the claim in the registry, inasmuch as, being a debt owing to German nationals, it had to be settled through the intervention of clearing houses:—

Held, that the defendant's claim was not a debt but a right, which by art. 297 of the Peace Treaty was subject to the right to be retained and liquidated "in accordance with the law of the allied state . . . . concerned," namely, Great Britain; that, not being a debt, art. 296 did not apply, and that, although the defendants would not be able to handle the sum awarded, there was nothing in art. 297 or in s. 1, sub-s. 17, of the Treaty of Peace Order (which makes provisions with a view to making effective and enforcing, inter alia, rights belonging to German nationals) to deprive the defendants of their right to proceed to a reference, or to prevent the plaintiffs paying money into Court with a notice that it was in satisfaction of the claim of German subjects.

SUMMONS argued in chambers and adjourned into Court for judgment.

The plaintiffs were the owners of the steamship *Karamea*, Messrs. Shaw, Savill, Albion & Co., Ld.

The defendants, the German owners of the steamship *Marie Gartz*, were the holders of a judgment in their favour made before August, 1914, whereby the plaintiffs and their bail were condemned in the defendants' damages arising

1920

THE MARIE GARTZ.

out of a collision between the two steamships, and the defendants' damages were referred to the Registrar and merchants to assess the amount thereof. The defendants had not filed their claim in the registry when war broke out. In November, 1919, the defendants' solicitors gave the plaintiffs' solicitors notice of their intention to proceed, and a few days before January 10, 1920, filed the defendants' claim and vouchers. The plaintiffs took out a summons for an order that the filing and service of the claim and vouchers of the defendants should be set aside, and that the defendants' claim should be removed from the file. The Registrar refused to so order, and from that refusal the plaintiffs appealed.

Alfred Bucknill for the plaintiffs.

C. R. Dunlop K.C. and *G. P. Langton* for the defendants.

Cur. adv. vult.

March 15. HILL J. read the following judgment. [After stating the facts his Lordship said :] Two points were taken before me on behalf of the plaintiffs. First, it was objected that the notice to proceed was given, and the claim and vouchers were filed, before the Treaty of Peace was ratified, that is before January 10, 1920. This is a technical but a sound objection. Until the Treaty of Peace was ratified the defendants were alien enemies and had no locus standi in the King's Courts. The plaintiffs, however, were willing to waive this objection, and I see no objection to the claim and vouchers being treated as filed on Monday, January 12, 1920.

The second objection is of more importance, and is based on the Treaty of Peace Order, 1919, made under the Treaty of Peace Act, 1919. The plaintiffs contend that neither the defendants nor the plaintiffs have any right to litigate the defendants' claim in the ordinary way, and that they, the plaintiffs, cannot appear at the reference without committing an offence under the Order in Council. Prima facie, the defendants have a right to proceed upon their judgment and prove their damages and obtain a report. Is there anything

1920

THE MARIE GARTZ.

Hill J.

in the Order in Council which deprives them of that right, or makes it illegal for them or for the plaintiffs to attend at the reference, or for the Registrar and merchants to hear it and make a report? The argument was mainly based upon art. 296 of the Treaty of Peace, as made law by the Treaty of Peace Order in Council, but reference was also made to art. 297. (1) These articles and others, which make up ss. 3 to 7 of Part 10 of the Treaty, are given the force of law by the Order in Council. The Treaty of Peace Act, 1919, under which the order is made, gives power to His Majesty to "make such Orders in Council and do such things as appeared to him to be necessary for carrying out the Treaty and for giving effect to any of the provisions of the Treaty." In pursuance of that, the Treaty of Peace Order was made, and it gives the effect of law to the articles I have mentioned, and makes various provisions for carrying out those articles.

In my opinion, art. 296 does not apply to the defendants' claim, but art. 297 does. Art. 296 deals with debts, and, so far as obligations of private persons are concerned, is careful to limit its application to that particular class of "pecuniary obligations." It contemplates that debts may be admitted or not admitted; but it deals only with debts. In terms it distinguishes between "debts" and the "proceeds of liquidation of enemy property, rights and interests." The Order in Council which makes the articles law, and which is made under powers for giving effect to the Treaty, cannot give a wider meaning to "debts." For the purposes of the order, the claim of the defendants is, in my opinion, not a "debt." It is, however, a "right." It is a right to have the defendants' damages ascertained and the judgment turned into a judgment for a liquidated sum. Being a right belonging to a German national within the territory of the King, it comes within art. 297, and is by 297 (*b*) subject to the "right to retain and liquidate" it in accordance with the Treaty, and

(1) Art. 296 provides for the settlement, through the intervention of clearing houses to be established by each of the High Contracting Parties, of various classes of "pecuniary obligations."

Art. 297 deals with "the question of private property, rights and interests in an enemy country."

comes within the provisions of s. 1, sub-s. 16, of the Order in Council which creates a charge upon "All property, rights and interests within his Majesty's Dominions and Protectorates belonging to German nationals . . . . and the net proceeds of their sale, liquidation or other dealings therewith."

It is, therefore, a right of a German national subject to the charge so created. But it is to be observed that it has not been vested in the custodian under s. 1, sub-s. 17 (*d*), of the Order in Council. What is the position of the German national entitled to such a right so charged and of the British national bound by it? Art. 297 (*b*) provides that: "The liquidation shall be carried out in accordance with the laws of the Allied or associated State concerned"—namely, in this case, of England. There is nothing in that to prevent the reference being held. The Order in Council by s. 1, sub-s. 17, makes provisions "with a view to making effective and enforcing such charge as aforesaid," and it includes among those provisions the following: "(*a*) No person shall, without the consent of the Custodian, transfer, part with or otherwise deal in any . . . . right . . . . subject to the charge." This applies to the defendants. And: "(*e*) If any person called upon to pay any money or to transfer or otherwise to deal with any . . . . rights . . . . has reason to suspect that the same are subject to such charge as aforesaid, he shall before paying transferring or dealing with the same report the matter to the Custodian and shall comply with any directions that the Custodian may give with respect thereto." As to (*a*), I cannot think that by proving the claim in the reference and obtaining a report the defendants will deal in the right, and certainly they will not transfer or part with it. As to (*e*), even if to attend the reference were a dealing with the right, which I think it is not, the plaintiffs have reported the matter to the custodian, and the custodian has not directed them to do or not to do anything.

I can find nothing in the Order in Council which deprives the defendants of their right to proceed to a reference and obtain a report, or which makes it illegal for the plaintiffs

1920

THE MARIE GARTZ.

Hill J.

to take part in the reference. The defendants will not be able to handle the money, but, as under the Treaty Germany undertakes to compensate its nationals in respect of the retention of their rights (art. 297 (i.)), it may be important for them to have the amount ascertained.

The plaintiffs objected that they would not be able to tender. I agree that they can offer no payment to the defendants, but I see nothing to prevent their paying money into Court, with a notice that it is in satisfaction of the claim of a German national. The charge will prevent the money being paid out to the defendants, and the Registrar will be able to deal with the question of costs, having regard to the payment in.

The plaintiffs also said that, having lost a ship by submarine attack, they had a special right of set-off under art. 296, annex 14. (1) I decide nothing about that. I decide nothing about the application of the damages when liquidated. Art. 297 provides for that, and it may or may not be that when art. 297 is applied to the proceeds of the liquidation of this right the plaintiffs will be able to apply to have the benefit of annex 14 of art. 296. I do not decide the point one way or the other. I am only deciding that there is nothing in the Order in Council which deprives the defendants of their legal right to prove their damages on a reference or which makes it illegal for the plaintiffs to take part in that reference.

I therefore dismiss the appeal, but as the defendants can only put themselves right by getting their claim and vouchers treated as of January 12, 1920, the plaintiffs were technically right, and ought to have the costs of the summons, both here and before the Registrar.

Solicitors for the plaintiffs : *Ince, Colt, Ince & Roscoe.*
Solicitors for the defendants : *Stokes & Stokes.*

(1) Annex 14: "The Debtor Clearing Office will credit the Creditor Clearing Office with all debts admitted. . . . As an exception, the admitted debts owing by persons having suffered injury from acts of war shall only be credited to the Creditor Clearing Office when the compensation due to the person concerned in respect of such injury shall have been paid."

E. C. T.

(In Prize.)

1920
March 3, 16.

THE RANNVEIG.

[1919, No. 1942.]

Prize Court—Cargo bound to Enemy Base of Supply—Seizure after Armistice —Licence to trade—Agreement of April 30, 1918, *made between U.S.A. and Norway.*

By art. 3 of an agreement made between the United States of America and Norway on April 30, 1918, and assented to by Great Britain and other Allied Powers, Norway agreed not to export to the Central Powers or their Allies foodstuffs of any kinds except fish and fish products, which might be exported in quantities not exceeding 48,000 tons per annum, and 15,000 tons in any three months. The supervision of the export of fish to Germany under the agreement was left to the Government of Norway, which set up, with the knowledge of the Powers, a system of control of the export and reported to the Powers every month the total of the shipments actually made.

On November 11, 1918, an armistice was concluded between the Allied Powers and Germany. On March 6, 1919, while the armistice was still in force, a Norwegian vessel bound from a Norwegian port to Stettin with a full cargo of salted herrings, owned by a German company, was captured by a British warship. Both the vessel and her cargo were put in prize. Claims for the release of the vessel and her cargo with damages and costs were made by the respective owners on the grounds that the cargo was being carried to Germany with the knowledge of H.M. Government and under licence, and that, there being a suspension of hostilities, the dispatch of foodstuffs to a German base of supply raised no presumption that they were destined for military use:—

Held, that there was nothing in the terms of the agreement which authorized Norwegians to engage in contraband trade; that the trade provided for was only that which was consistent with neutrality; and that the terms of the armistice did not concede to Germany the privilege of importing foodstuffs to her bases of supply. The cargo was therefore subject to condemnation, and it followed that the ship, carrying a full cargo of contraband to an enemy base of supply, was also subject to condemnation.

Action for the condemnation of ship and cargo.

On March 6, 1919, the Norwegian steamship *Rannveig*, bound from Trondhjem to Stettin with a cargo of salted herrings, was captured by H.M.S. *Vidette*, and both ship and cargo were put in prize.

Claims for release and for damages and costs were entered by the owners of the *Rannveig*, and by the owners of the cargo,

1920

THE RANNVEIG.

a German fish distributing company, on the grounds that trade between Norway and Germany in fish and fish products had been licensed by the Allied Powers, and that, as the capture took place after the armistice had been concluded between the Allied Powers and Germany, the dispatch of foodstuffs to a German base of supply raised no presumption that they were intended for military use. The licence relied on was an agreement concluded between the United States of America and Norway on April 30, 1918, and assented to by Great Britain and other Allied Powers, whereby Norway agreed not to export foodstuff to Germany with the exception of fish and fish products which it was agreed might be exported in quantities not exceeding 48,000 tons per annum and 15,000 tons in any three months. The fish laden on the *Rannveig* was within the limits agreed upon.

Sir Erle Richards K.C. and *Balloch* for the owners of the *Rannveig*. The only object of the agreement of April 30, 1918, was to relieve cargoes bound to German ports from the risk of seizure. The agreement was assented to by Great Britain, and consequently Norwegian shipowners had a right to rely upon it, and the Prize Court is bound to give effect to it. The Norwegian Government had the right to export up to the agreed quantity without interference; if belligerents still had the right to seize fish cargoes bound to German ports the so-called concession was of no value.

Leck K.C. and *Roland Burrows* for the cargo owners. After the armistice concluded on November 11, 1918, the Prize Court must be satisfied that foodstuffs bound to a German port were in fact intended for military purposes. There is no evidence of this, and no inference to that effect can be drawn from the fact that the cargo was consigned to a base of supply. Under the terms of the armistice the Allied Powers had the duty of supporting the civilian population of Germany. The Norwegian Government, in accordance with the agreement of April 30, 1918, had granted a permit for the shipment of this cargo: see as to licences and their effect, *Uspariche* v. *Noble*. (1)

(1) (1811) 13 East, 332.

1920

THE RANNVEIG.

Sir Gordon Hewart A.-G., *Pearce Higgins* and *H. Hull* for the Procurator-General. At the date of the seizure Great Britain was not at peace with Germany, therefore the two countries were still at war, for there is no intermediate stage. An armistice merely involves the temporary cessation of hostilities. Under the agreement between the United States and Norway the Norwegian Government for consideration—namely, a certain maximum export in fish and fish products—agreed to restrict her export trade. That agreement in no way affected the right of a belligerent to seize a cargo of contraband bound to an enemy base of supply and did not license Norwegian shipowners to engage in contraband trade. Further, the owners of the *Rannveig* appreciated the risk they ran and had asked the Norwegian Shipowners' Association to request the British Government's permission to trade to German ports; and they had been informed that she would be liable to capture if she carried cargo to Germany, the vessel having been expressly excepted from the operation of an agreement of the Norwegian Shipowners' Association whereby the Allies secured the services for their trade of other Norwegian tonnage. By the express terms of the armistice the blockade conditions remained unchanged. Both ship and cargo are therefore subject to condemnation : *The Hakan.* (1)

Cur. adv. vult.

March 16. THE PRESIDENT (SIR HENRY DUKE) read the following judgment : His Majesty's Procurator-General claims the condemnation as prize of the Norwegian steamship *Rannveig* and her cargo of 8898 barrels of salted herrings which were captured by H.M.S. *Vidette* on March 6, 1919, in the course of transit by sea from the Norwegian port of Trondhjem to the German port of Stettin. At the time of the capture foodstuffs were conditional contraband under His Majesty's Proclamations of December, 1914, and subsequent dates, and Stettin had been found in this Court to be a German base of supplies ; and the armistice concluded between the Allied Powers and Germany on November 11, 1918, was in operation.

(1) [1918] A. C. 148.

1920

THE RANNVEIG.

The President.

Claim for the release of the vessel with damages and costs is made by the Norwegian owners on two grounds—that the cargo of fish " was being carried to Stettin with the knowledge, permission, and consent of His Majesty's Government " and " was being carried to Germany under licence issued by the Norwegian Food Department in pursuance of an agreement made between the Norwegian Government and the Government of the United States, with the assent of His Majesty's Government, dated April 30, 1918, according to the provisions of which Norway is entitled to export to the Central Powers and their Allies fish and fish products up to 48,000 tons per annum." The claimants to the cargo, who also claim damages and costs, are the Reichs-fischversorgung Gesellschaft, ... of Berlin, who allege themselves to be the true owners of the cargo, and assert that " the goods were being imported into Germany under permit." The appearance of these claimants was received on July 4, 1919, during the war, under reservation by the Procurator-General of his right to contend that the claimants had no right to enter an appearance. At the time of appearance this was, no doubt, a well-founded reservation. No objection was, however, raised at the hearing to the appearance of counsel for the claimants, and Mr. Leck argued the case on their behalf.

Sir Erle Richards on behalf of the shipowners, did not dispute that Stettin must be regarded by me as a German base of supplies, or that foodstuffs in transit thither by sea in March, 1919, were prima facie subject to capture and condemnation. He proved, however, an agreement made between the United States of America and Norway on April 30, 1918, with regard to trade between Norway and various belligerents, assented to by Great Britain and other Allied Powers; and upon the terms of this Convention and the action thereunder of the Norwegian Government, he founded the claim for exemption from capture upon which his clients rely. The agreement in question is expressed as being made for the duration of the war, subject to provisions for determination which do not affect this case. The main subjects of the agreement are the supply to Norway of commodities from the United

1920

THE RANNVEIG.

The President.

States and the disposal by Norway of the exportable surplus of certain classes of Norwegian produce. With regard to fish and fish products, it was agreed as follows:—Art. III. "Norway will not export to the Central Powers or their Allies foodstuffs of any kind except fish and fish products. Fish and fish products may be exported in quantities not to exceed 48,000 tons per annum. . . . . The quantity of fish and fish products which may be exported to Germany and her Allies shall not exceed 15,000 tons in any three months. The export of each class of fish and fish products is to be made in the form in ordinary commercial use in the past. . . . . Art. IV. The quantities which it is expected will be available for export to the United States and the countries associated with the United States in the war are substantially as follows:—. . . . . (5) Fish and fish products, 48,000 tons."

The claimants show by their evidence that the surveillance of the export of fish to Germany under the agreement was left by the United States and the Allied Powers to the Government of Norway, that the Norwegian Government set up with the knowledge of the Powers a system of control of the export and reported to them monthly the totals of the shipments actually made, and that the fish laden on board the *Rannveig* was in point of quantity within the limits of 48,000 tons per annum and 15,000 tons per quarter exportable to Germany under the agreement. The *Rannveig* was a steamship which had been during the war constantly employed in trade between Norwegian and German ports, including the fish trade, and she had been expressly excepted from the operation of an agreement of the Norwegian Shipowners' Association whereby the Allies secured the services for their trade of other Norwegian tonnage. Mr. Samuelson, managing director of the Aktieselskabet Osterjolingen, stated, and the fact no doubt is, that all shipments of fish to Germany under the agreement of April 30, 1918, were made under licences which were controlled by the Norwegian Customs, and that the cargo in question was loaded under such a licence. In para. 8 of his affidavit he sets forth the conclusions and acts on his part which led to the dispatch of the *Rannveig* on the voyage upon

1920

THE RANNVEIG.

The President.

which she was captured. He says: "I was of opinion (*a*) that by reason of the British Government having accepted the benefits of the tonnage agreement, subject to the exception of the named ships, including the *Rannveig*, so long as they continued in the same trade, I was entitled to continue the said ship in such trade, and (*b*) that by reason of conditions of the American agreement I was entitled to carry cargoes to Germany in the *Rannveig* within the ration. But after the armistice was announced, and it became known that British war vessels were in the Baltic presumably for the purpose of controlling trade with Germany, and a system of control was established, it occurred to me that it was possible that the commanders of these vessels had not been informed of the arrangements which had been made, especially those in relation to the *Rannveig*. I therefore asked the Norwegian Shipowners' Association to address a request to the British authorities that they should call attention to the arrangement so that the said ships should not suffer detention, and I am informed that on November 18, 1918, a communication to this effect was addressed by the Norwegian Shipowners' Association to the British Legation at Christiania. I was afterwards informed by the Shipowners' Association by telegrams of November 27 and December 2 that the British Legation contended that the ships were liable to capture while carrying cargo to Germany. As this, in my opinion, must be wrong, as the Legation could not say that England, having the benefit of the tonnage agreement and of the American agreement, nevertheless should deny the ships to proceed and thus disregard one of the conditions of the said agreements, I consequently had nothing else to do than to let my ships go without any special permit." On November 18, 1918, the Director of the Norwegian Shipowners' Association wrote to the British Legation at Christiania this letter: "We beg to inform you that we have been approached by owners of vessels running to German Baltic ports during the war [for instructions] whether they could continue in the trade after the change in the situation in the Baltic as a result of the general armistice of the 11th instant. We have replied that in accordance

1920

THE RANNVEIG.

The President.

with arrangement in connection with the tonnage agreement, certain named vessels were allowed to continue in said trade, and that such vessels which have not been removed from the German trade may continue to trade on German ports. We expect that the following steamers will remain in the Norwegian German service, s.s. *Rannveig* and s.s. *Gunvor III.* We would thank you in case you should find it necessary kindly to call the British authorities' attention to this arrangement, so that these steamers are not going to be detained by the British warships or authorities, which may now control the traffic in the Baltic." He received a reply, the purport of which appears from the following telegram, which he forwarded to the managing owner of the *Rannveig* :— "B. Samuelson and Son, Bergen. *Rannveig*, *Gunvor III.*, British Legation inform us that the ships are liable to capture if cargo is carried to Germany. England interprets our tonnage agreement on this point that they would not demand these ships transfer to Allied trade."

It was at the end of February, 1919, that the *Rannveig* was loaded in Norwegian ports and dispatched from Trondhjem, and on March 6 that she was captured in the Baltic and sent to Leith in charge of a prize crew.

Sir Erle Richards contended that the agreement of the United States of America with Norway made with the assent of Great Britain had the effect of a treaty binding upon His Majesty's Government for the period of its duration, whereby the Norwegian herring trade with Germany to the extent limited by the agreement was exempt from interruption by British naval force. He argued also that there was acquiescence by the Allied Powers in the mode of conducting the fish trade of Norway with Germany during 1918, which ought under the agreement to be held to render the capture unwarrantable. Seizure of a vessel engaged regularly in the trade in question was, he said, an act which must render the agreement in favour of the trade practically inoperative. On the subject of condemnation it was further submitted that at any rate the shipowners had honestly supposed the trade in which they engaged their vessel to be a licensed trade, and

1920

THE RANNVEIG.

The President.

they ought, therefore, to be free from the extreme penalty of confiscation.

For the cargo claimants, reliance was placed on the facts already mentioned, and also upon the fact that the seizure took place during the armistice. There being a suspension of hostilities it was insisted that the dispatch of foodstuffs to a German base of supply raised no presumption that the same were destined for military use, and that the claim of the Crown ought to fail for want of express proof to that effect.

The first question involved in the decision of the case is that of the efficacy under international law of the agreement of April 30, 1918, and the extent of its operation as an assurance of the allowance of the Norwegian trade with Germany in fish and fish products to which it refers. There is no novelty in the concession or recognition by treaty of special trade privileges or immunities for a contracting party who remains neutral as against another contracting party who becomes or is a belligerent. Numerous treaties to which England was party in the seventeenth and eighteenth centuries contain stipulations of this kind, and they have been sometimes discussed in our Courts. (See *The Goede Hoop* (1); *The Vryheid* (2); *The Acteon* (3); and *The Twende Brodre.* (4) The sovereign will of the Powers engaged affords the only measure of the possible extent of such concessions. A judge exercising jurisdiction in Prize has only to determine their meaning and effect when they bear upon claims for condemnation or release, i.e., for some decree or relief which is within the scope of his authority. Treating the export of fish by the *Rannveig*, for the moment, as an act of trade by a Norwegian trader, the question which arises upon the facts is not whether the agreement is in its terms effective to sanction export of fish to Germany, but whether while Germany was a belligerent against the Allies it was effective to sanction the carriage of contraband to a German base of supply. To license such a transaction on the part of an alien friend would be to license an unneutral act whereby he must of necessity lose his character

(1) (1809) Edw. 327.
(2) (1778) Hay & Marriott, 188.
(3) (1815) 2 Dods. 48.
(4) (1801) 4 C. Rob. 33.

1920

THE RANNVEIG.

The President.

of friend. There is nothing in the terms of the agreement which shows an intention to authorize Norwegian traders to do any act inconsistent with neutrality. The Norwegian trade with Germany in fish which is provided for is, in my opinion, that trade only which is consistent with neutrality, and not trade which is contraband. Applying every-day rules of construction I come to a like conclusion with that which Sir James Marriott expressed in 1778 in his judgment in *The Vryheid* (1)—namely, that a treaty right to trade with the enemy in goods which conditionally are contraband must in the absence of express stipulation be limited to "goods going in the ordinary course of merchandise and for mercantile purposes." I therefore hold that the conveyance of fish from Norway to Stettin, so long as foodstuffs were conditional contraband, was not by the agreement of April 30, 1918, permitted to Norwegian traders.

Whether the armistice which was concluded on November 11, 1918, suspended the operation of the then subsisting Proclamations as to contraband can be determined by reference to the actual terms of the armistice without entering upon any detailed discussion of the implications which may or must arise from the conclusion of an armistice. Art. 26 of the terms of the armistice is in these words: "The existing blockade conditions set up by the Allied and Associated Powers are to remain unchanged, and all German merchant ships found at sea are to remain liable to capture. The Allies and United States contemplate the provisioning of Germany during the armistice as shall be found necessary." I take it to be a sound proposition that an armistice does not necessarily imply the right to re-provision a beleaguered area or to remove the blockade of a coast: see Hall, 7th ed., p. 585; Halleck, 4th ed., vol. ii., p. 351, but I think the question need not be examined in this case, since the terms here agreed upon preclude the contention that the Allied Powers had conceded to Germany any privilege of free importation of foodstuffs to her bases of supply.

So far as regarded traffic by sea to Stettin the armistice did

(1) Hay & Marriott, 188.

1920

THE RANNVEIG.

The President.

not grant anything to the enemy. Only by opening German trade could it have enlarged the rights reserved to Norwegian citizens under the agreement, and since it did not reopen German trade it is ineffectual as an independent ground of immunity for the present neutral claimants.

Whether a Norwegian owner of fish might have raised effectual objection against rights by capture arising under a blockade set up after the agreement was concluded, I need not consider. These claimants are not Norwegian subjects. They were not within any class of traders for whose benefit this agreement was made by the Norwegian Government. They are simply a German corporation who had purchased foodstuffs in Norway for the German State and were engaged in conveying the same by sea to a German base of supply. It is hard, if not impossible, to find any ground of principle on which a claim on their part can be founded.

As to the cargo, therefore, I come to the conclusion that the claim of the Procurator-General must prevail and there must be a decree of condemnation of the herrings as foodstuffs captured in course of transit to an enemy base.

The cargo of the *Rannveig* being contraband, what is the position of her owners ? They dispatched their ship not only with full knowledge of the character of the burden and of its destination, but after the plainest possible warning of the risks they ran in so doing. There is no ground for the submission that they were misled. Under such circumstances none of the considerations arise which relieve from the penalty of confiscation shipowners who innocently carry contraband. Having regard to the rule laid down in *The Hakan* (1) it is my duty to pronounce condemnation of the *Rannveig* as good and lawful prize.

Solicitor for the Procurator-General : *The Treasury Solicitor.*
Solicitors for the shipowners : *Botterell & Roche.*
Solicitors for the cargo-owners : *Waltons & Co.*

(1) [1918] A. C. 148.

E. C. T.

[ADMIRALTY.]

1920
March 15, 17

THE CEYLON.

THE CEYLON.

(1919, fol. 331.)

Admiralty—Collision—Application of Sea Regulations to River Tyne—Tyne By-laws—Regulations for Preventing Collisions at Sea, art. 16.

The regulations for preventing collisions at sea apply to "all vessels upon the high seas, and in all inland waters connected therewith navigable by sea-going vessels"; but, by art. 30 of the regulations, nothing in the rules "shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river, or inland waters."

The River Tyne by-laws provide in great detail for vessels navigating on their proper side of the channel; for fog signals; and for speed in fog;—

Held, that, as the by-laws dealt with the whole scope of the duties of vessels in fog, the sea regulations did not apply; and that a vessel which was proceeding "at a very moderate speed," as required by by-law 39, was not to blame for not stopping her engines, as required by art. 16 of the sea regulations, on hearing, forward of her beam, the fog whistle of an approaching vessel, the position of which was not ascertained.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Oscar Fredrik*; the defendants and counterclaimants were the owners of the steamship *Ceylon*.

The collision took place about 9 A.M. on February 13, 1919, inside the piers at the entrance to the River Tyne.

The *Oscar Fredrik*, a Swedish steamship of 4379 tons gross, was in charge of a pilot, inward bound with a general cargo. The *Ceylon*, a steamship of 5235 tons gross, was also in charge of a pilot, outward bound with a general cargo and passengers. The weather was foggy, and the vessels sighted each other at a distance of less than a quarter of a mile. The tide was low water or just beginning to make.

According to the statement of claim the *Oscar Fredrik* was entering the river well to the northward of mid-channel, making about two to three knots and sounding for fog, when

1920

THE CEYLON.

a long blast was heard from the whistle of a steamer apparently ahead. The engines were at once stopped and a long blast was sounded in reply. Shortly afterwards a second long blast was heard and replied to, and the engines were put slow ahead in order to maintain steerage way. Almost immediately afterwards a short blast was heard. The helm of the *Oscar Fredrik* was thereupon ported and a short blast sounded in reply. Another short blast was then heard, apparently much closer, and the helm of the *Oscar Fredrik* was put hard-a-port and her whistle again sounded one short blast. Directly afterwards the *Ceylon* came into view distant about 2 to 3 ships' lengths and bearing about ahead or a little on the starboard bow. The engines of the *Oscar Fredrik* were thereupon put full speed astern, three short blasts were sounded, and the helm was kept hard-a-port, but the *Ceylon*, though she dropped her anchor at the last moment, came on and struck the *Oscar Fredrik*.

The plaintiffs alleged, inter alia, that the *Ceylon* failed to keep on that side of the fairway which lay on her own starboard hand; and failed, on hearing forward of her beam the fog signal of the *Oscar Fredrik*, the position of which was not ascertained, to stop her engines and thereafter navigate with caution.

According to the defence, the *Ceylon*, on a course of about E magnetic, was coming down in the south channel, following the steamship *Luga* and followed by the steamship *Loke*, and was making about two to three knots and sounding for fog when a whistle was heard ahead, which was taken to be the fog whistle of the *Luga*. Shortly afterwards the *Oscar Fredrik*, proceeding at high speed, came in sight about a point on the port bow, about a quarter of a mile distant, crossing the course of the *Ceylon* with her starboard bow open. The engines of the *Ceylon* were at once stopped and put full speed astern, three short blasts were sounded, and the port anchor was dropped, but the *Oscar Fredrik* came on across the river and with her starboard bow struck the stern of the *Ceylon*.

The defendants alleged, inter alia, that the *Oscar Fredrik*

failed to navigate at a moderate speed and failed to keep to her starboard side of mid-channel.

D. Stephens K.C. and *Dumas* for the plaintiffs.

Laing K.C. and *Lewis Noad* for the defendants.

[It was argued for the plaintiffs that the *Ceylon* must be to blame under art. 16 of the sea regulations for not stopping her engines on hearing forward of her beam the whistle of a steamship which in fact was that of the *Oscar Fredrik* and not that of the *Luga*. For the defendants it was contended that the Tyne by-laws only were applicable as they exhaustively provided for the duties of vessels in fog: see *The Carlotta* (1); that the *Ceylon* was proceeding at a very moderate speed; and that in any event the not stopping of the engines was justified as the whistle signal heard ahead was either that of the *Luga*, which was outward bound, or, if that of an incoming ship, a ship which according to the rules the defendants were entitled to assume was coming in to the north of mid-channel. In this connection *The Hare* (2) was referred to.]

Cur. adv. vult.

March 17. HILL J., after stating the respective cases, said that he found that the collision happened well over on the south side of the channel in the *Ceylon's* water, and that that was the main if not the sole cause of the collision. [His Lordship continued:] This leaves for consideration the charges against the *Ceylon*, (1.) of speed, and (2.) of not stopping the engines. As to speed, I find that it was moderate. It may have been rather more than two or three knots, but it was not much more, and, in the circumstances, it was moderate. It is significant that she was preceded by the *Luga*, which she was not overhauling, and she was followed by the *Loke*, which was not overhauling her until the *Ceylon* stopped her way by dropping her anchor. They were all coming down at about the same speed, and, applying the best test I can, I find that they were not making

(1) [1899] P. 223. (2) [1904] P. 331.

1920

THE CEYLON

Hill J.

more than four knots, and the Elder Brethren think that that was a moderate speed, and I agree.

As to not stopping the engines, the *Ceylon* heard a long blast, some of the witnesses think more than once, right ahead. The pilot, who was steering by objects on the south shore, and who knew the *Luga* was going down in front of him, concluded that it came from the *Luga*. He did not stop the engines. The plaintiffs say that this was a breach of art. 16 of the sea regulations. The defendants say, first, that the sea regulations did not apply, and secondly, that their not stopping was justified, for the position of the ship ahead was ascertained, for it was either the *Luga*, which was known to be outward bound, or, if it was an incoming ship, then a ship which was to be presumed to be coming up north of mid-channel; and in this connection the defendants refer to *The Hare*. (1)

Whether the sea regulations apply is a difficult question. The sea regulations are prima facie applicable to the waters in question, for they are "waters connected with the high seas, navigable by sea-going vessels" within the preliminary to the sea regulations. It is not disputed that the Tyne rules are applicable to the waters in question. The Tyne rules are made under proper local authority. By art. 30 of the sea regulations: "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river, or inland waters." By art. 16 of the sea regulations (by the addition made in 1897), if that article is applicable, the *Ceylon*, on hearing, apparently forward of her beam, the fog signal of a vessel the position of which was not ascertained, should, as far as the circumstances of the case admitted, have stopped her engines and then navigated with caution until danger of collision was over. And by the sea regulations this rule is applicable in narrow channels as elsewhere. The only difference, if the ships are in a narrow channel, is that that circumstance may affect the question whether "the circumstances of the case admit" and the question whether "the position of the vessel is ascertained" or not.

(1) [1904] P. 331.

The Tyne rules provide with great detail for vessels keeping on their own side of the channel when in the channel. They also provide for the way in which the entrance to the gateway between the piers is to be approached. Then, as to fog, they provide by rule 18 the fog signals which are to be sounded, and by rule 30 it is provided that " every vessel under way when overtaken by a fog shall be navigated at a very moderate speed, and shall, as soon as practicable, be moored or anchored out of the navigable channel. Vessels shall not, without the permission of the harbour master, be got under way during a fog."

In *The Carlotta* (1) a very similar question arose. The question in that case was whether a ship in the Thames being aground ought not only to make the whistle signal required by the Thames rules, but also to exhibit two black balls under art. 4 (*a*) of the sea regulations. It was held that art. 4 (*a*) of the sea regulations did not apply to a ship aground and therefore the other part of the judgment was in effect obiter ; but Barnes J., in a careful and considered judgment, which is relevant to this case, dealt with the question on the assumption that art. 4 (*a*) did apply to a ship aground, and on that assumption he held that the matter was governed by the Thames rule and not by the sea regulations. His reasoning is summed up in the last words : " Where there is a certain rule which deals with the whole scope of the subject, to add parts of provisions of the sea rules would be to interfere with the operation of the river rules." It will be noticed there that the subject was what signal should be given, either by sound or exhibition, by a vessel aground. The Thames rule provides for a whistle signal and the sea rule for the exhibition of two black balls. It might well be said that these were not inconsistent, but one supplementary to the other, and therefore both should apply ; but Barnes J. held that, inasmuch as the Thames rule dealt with the whole scope of the subject of ships aground, and provided the signal for it, the sea regulation which dealt with the same subject-matter was excluded. Applying that to the present case the Tyne River rules 18 and 39 seem to me to deal with the whole scope of the subject of

(1) [1899] P. 223.

1920

THE CEYLON.

Hill J.

the duties of ships in fog in the river, and to add to them the second provision of art. 16 of the sea regulations would, in my opinion, be as much to interfere with the river rules as in *The Carlotta* (1) it was to add the sea regulation as to exhibiting black balls. I arrive at this conclusion with considerable hesitation. Applying rule 39 of the Tyne rules, I find that the *Ceylon* was being navigated at a "very moderate speed," and nobody has suggested on either side that the circumstances were such that either of these ships ought to have been moored or anchored out of the main channel.

Having found, as I have, with regard to the rules, it is unnecessary to consider whether I ought to extend the decision in *The Hare* (2) to cover a case where ships are in a natural channel of the width of the lower Tyne. The *Hare* was in collision in the Manchester Ship Canal, and I should hesitate—I should want to consider the matter much more carefully—before I should think it right to extend the reasoning which was applied to a collision in the Manchester Ship Canal to a collision in a narrow water as wide as the lower part of the Tyne. I do not express an opinion one way or the other upon it. I will only add this: If the matter is to be considered independently of rules altogether, I have asked the Elder Brethren whether, in their opinion, it was contrary to good seamanship or an unreasonable thing for the *Ceylon* to act as she did in not stopping, and they advise me that they cannot say that it was either contrary to good seamanship or an unreasonable thing, in the circumstances of the case.

I therefore find that these allegations against the *Ceylon* are not made out. The matter stands or falls entirely on the question of the side of the channel, and that I have decided in favour of the *Ceylon*.

I therefore pronounce the *Oscar Fredrik* alone to blame.

Solicitors for the plaintiffs: *Botterell & Roche for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for the defendants: *Stokes & Stokes for Bramwell, Clayton & Clayton, Newcastle-on-Tyne.*

(1) [1899] P. 223, 228. (2) [1904] P. 331.

[ADMIRALTY.]

1920
Feb. 16, 23;
March 23.

THE CEDRIC.

THE CEDRIC.

(1918, fol. 117.)

Admiralty—Collision—Joint Tort Feasors—Damages for Loss of Life—Right of Contribution—Doctrine of Common Employment—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57).

As the result of a collision between the French steamship *Y. O.* and the British steamship *C*, the *Y. O.* sank and several of her crew were drowned. Both vessels were held to blame for the collision in equal degrees. The owners of the *Y. O.* proved their damages in the registry. Meanwhile representatives of the deceased members of the crew of the *Y. O.* had begun actions in the King's Bench Division against the owners of the *C.* who admitted liability. Pending the ascertainment of these damages by a sheriff's jury, the owners of the *C.* applied by motion (*a*) for an order that they might be allowed to pay into Court the amount of the damages found by the Registrar to be due to the owners of the *Y. O.*; and (*b*) for a declaration that under the Maritime Conventions Act, 1911, they were entitled to deduct from that sum half the amount they would have to pay in respect of the life claims.

It was admitted that the liability of the owner of the *Y. O.* in respect of the loss of life on his vessel was governed by French law, and the Court found that according to French law the owner of the *Y. O.* would not be liable if sued by the representatives of deceased members of the crew:—

Held, that, as under the provisos to ss. 1 and 3 of the Maritime Conventions Act these sections were not to be construed as imposing any liability upon any person who was exempted by any provision of law or who for any reason was not liable to be sued, the owners of the *C.*, when they paid the damages awarded in respect of the loss of life, would have no right of contribution from the owner of the *Y. O.*, and that the motion must be dismissed.

Held, further, that even if the case had been governed by English law the same result would follow, as the defence of common employment would have been open to the owner of the *Y. O.*

SUMMONS by plaintiff to confirm the report of the Registrar in an action of damage by collision. Cross-motion by the defendants.

The plaintiff was the owner of the French sailing vessel *Yvonne Odette*; the defendants were the owners of the British steamship *Cedric*.

The collision took place on July 1, 1917, in the English

1920

THE CEDRIC.

Channel, and the *Yvonne Odette* sank and sixteen of her crew were drowned. Both vessels were held to blame for the collision in equal degrees and the damages were referred to the Registrar and Merchants for assessment.

A reference was held, and in the result the Registrar reported that a sum of 7131*l.* was payable by the owners of the *Cedric* to the plaintiff. By his summons the plaintiff asked for the report of the Registrar to be confirmed. By their cross-notice of motion the defendants asked (*a*) that they might be at liberty to pay the damages into Court pending the assessment of damages in certain actions which had been entered in the King's Bench Division against them on behalf of the representatives of the deceased members of the crew of the *Yvonne Odette ;* and (*b*) for a declaration that they were entitled under the Maritime Conventions Act, 1911, and in particular under s. 3 of the Act(1), to recover contribution from the plaintiff of half the amount of the damages and costs awarded in

(1) By s. 1 it is provided that "when, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault :

"Provided that (*c*) nothing in this section shall . . . . be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law. . . . ."

Sect. 2 : "Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several :

"Provided that nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have relied in an action brought against him by the person injured, or any person or persons entitled to sue in respect of such loss of life. . . . ."

3. (1.) "Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owners of the other vessel or vessels to the extent to which those vessels were respectively in fault :

"Provided that no amount shall be so recovered which could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reason, have been recovered in the first instance as damages by the persons entitled to sue therefor."

the life claim actions and set them off against the fund in Court.

Balloch for the defendants. Although formerly, according to English law the representatives of the deceased members of the crew of the *Yvonne Odette* would have been barred from recovering damages against the owner of that vessel by the doctrine of common employment, the Maritime Conventions Act altered the law; the scheme of the Act was to create a joint liability, and whether governed by English or French law the representatives of the crew are entitled to sue the owner of the *Yvonne Odette*, otherwise the object of the Act—namely, to make the liability joint and several according to the degree of fault—would be defeated, as the owners of one of the wrong-doing vessels, the *Cedric*, would have to pay the whole of the damages in respect of the loss of life on the other vessel. The words in the proviso to s. 3 of the Act, that no contribution shall be recovered which could not "for any other reason" have been recovered as damages in the first instance, must be construed ejusdem generis with the preceding words "by reason of any statutory or contractual liability"; the defence of common employment is based upon neither. Further, although a shipowner whose vessel has been found partly to blame, if sued may plead an exemption to which he is entitled "by any provision of law" (s. 2), he is not entitled to set up that defence as against the owner of the other vessel who has also been found to blame. The Act creates a new liability and a new remedy: The defendants have suffered a "loss" by reason of having to pay damages in respect of the loss of life on the *Yvonne Odette*, and therefore come within the terms of s. 1 of the Act: see *The Cairnbahn*. (1) The liability of the owner of the *Yvonne Odette*, however, must be determined by French law, and under the French law as altered in 1915, he is liable for the damages in respect of the loss of life on board his vessel.

C. R. Dunlop K.C. for the plaintiff. Although the question of the liability of the plaintiff in respect of the damages for the

(1) [1914] P. 25.

1920

THE CEDRIC.

loss of life may be governed by French law, the defendants' right to contribution depends on English law, because they pray in aid an English statute. But the French law of December 29, 1905, in terms provides that a shipowner is not liable in respect of loss of life on board his vessel unless he has been personally negligent. That law is not overridden by the provisions of July 15, 1915. Accordingly, whether French or English law applies the plaintiff is not liable in damages in respect of the life claims, and therefore is not liable to contribute to the amount which will ultimately be found due by the sheriff's jury from the owners of the *Cedric*. This result is not contrary to the scheme of the Maritime Conventions Act; it is one of the provisions of the Act that no liability is thereby to be imposed upon any person who is exempted by any provision of law (s. 2), and that no contribution shall be recovered which for "any (other) reason" could not have been recovered as damages in the first instance (s. 3). The words "any other reason" cannot be construed in an ejusdem generis sense because there is no genus. The defendants' contention would render the proviso meaningless.

Balloch replied.

Cur. adv. vult.

March 23. HILL J. In the damage action between the *Yvonne Odette* and the *Cedric*, both ships were pronounced to blame. The *Yvonne Odette* was lost with several of her crew. The owner of the *Yvonne Odette* has proved his damages before the Registrar and Merchants, and by summons asks that the report be confirmed. The report includes claims for lost effects and share of fishing. Representatives of deceased members of the crew have begun actions in respect of loss of life against the owners of the *Cedric*, who admit liability. The amount of damages in those actions has not yet been determined.

The owners of the *Cedric* ask by motion that they may be at liberty to pay the amount of the damages found by the Registrar to be due to the owner of the *Yvonne Odette* into Court pending the ascertainment of the damages in the life

claims, and ask for a declaration that the owners of the *Cedric* are entitled to recover contribution from the owners of the *Yvonne Odette* for half the amount of the damages and costs in the life claims, and that, upon ascertainment of the damages and costs in the life claims and payment thereof by the owners of the *Cedric*, they may be at liberty to deduct from or set off against the amount of damages found due from them to the owners of the *Yvonne Odette* half the amount of the damages and costs paid in respect of the life claims.

The question for decision is whether the owners of the *Cedric* are entitled to such contribution. Assuming that they are not in a position to prove personal negligence, causing the loss, on the part of any particular deceased man as an answer to the claim of his representatives, the owners of the *Cedric* are liable in full in respect of the life claims. Whether they are entitled to contribution from the owners of the *Yvonne Odette* depends on whether the Maritime Conventions Act, 1911, gives them that right. Apart from the Act they can have no such right.

It is contended that they are given the right, firstly, by s. 1 of the Act, and secondly, by s. 3. The argument on s. 1 of the Act is based on the decision in *The Cairnbahn* (1), and is that s. 1 includes loss to the owners of the *Cedric* by reason of having to pay damages for loss of life on board the *Yvonne Odette*. The argument on s. 3 of the Act is based on the specific words of the section, which provides: "Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owner of the other vessel or vessels to the extent to which those vessels were respectively in fault."

I am not at all sure that s. 1 has any reference to liability for life claims, which are specifically dealt with by ss. 2 and 3. But, assuming that s. 1 and the reasoning in the decision in *The Cairnbahn* (1) do apply to life claims, both ss. 1 and 3 are

(1) [1914] P. 25.

1920

THE CEDRIC.

Hill J.

subject to a proviso. By the proviso to s. 1 the section is not to be construed as imposing any liability upon any person who is exempted by any provision of law. I leave out the words of the proviso not relevant to the question in this case. By the proviso to s. 3 the owners of the *Cedric* can only recover from the owner of the *Yvonne Odette* contribution to the damages for loss of life if the damages could in the first instance have been recovered from the owner of the *Yvonne Odette* had he been sued. This is carried out by sub-s. 2 of s. 3, which entitles the paying owner to stand in the shoes of the life claimants.

In either case, the Court has to find out whether the damages for loss of life on board the *Yvonne Odette* could have been recovered from the owner of the *Yvonne Odette* or whether he is exempted from liability by any provision of law. It was assumed in argument that the liability of the owner of the *Yvonne Odette* was governed by French law. If it were governed by English law the owner of the *Yvonne Odette* would certainly be exempt from actions under Lord Campbell's Act; the defence of common employment would be open to him. His only liability would be under the Workmen's Compensation Acts. What would be the effect under the Maritime Conventions Act of a Workmen's Compensation Act liability if the *Yvonne Odette* had been British, I need not consider. I desire to express no opinion upon it. The *Yvonne Odette* was French and her owner was not liable under the Workmen's Compensation Acts.

I have to ascertain whether, under French law, the owner of the *Yvonne Odette* is exempted from liability for the loss of life of the master and seamen on board his own ship. What is the French law is a question of fact. I have before me the evidence of two French lawyers, who express opposite views. M. Bodereaux, for the plaintiff, says that the question is determined by Articles 1 and 2 of the law of December 29, 1905, which in terms declares the owner free of liability, except in case of his own personal negligence. The French lawyer, for the defendants, does not dispute that that was the effect of the law of December 29, 1905, but says that the law of July 15,

1915, which, like the Maritime Conventions Act, 1911, was passed to give effect to certain conventions, overrides the law of December 29, 1905, and imposes upon the owner of a French ship liability for loss of life of any one on board his ship. He says that this is the result of the provision that " the ships at fault are jointly and severally (solidairement) liable to third parties for losses caused by death or wounds, subject only to the remedy (sauf recours) of the ship which may have paid a larger proportion than she is eventually found liable to pay under the foregoing paragraph " (i.e., the clause as to the proportions of loss).

In this controversy of fact, I am driven to look at the law of July 15, 1915, for myself. It deals with proportions of blame ; it provides that damage to ships, cargoes and effects and property of crews, passengers and persons on board are borne by the ships in fault in the aforesaid proportion without joint and several liability to third parties (sans solidarité à l'égard du tiers) ; it provides for life and personal injury claims as above stated. There are no provisos analogous to the provisos to ss. 1, 2 and 3 of the Maritime Conventions Act ; there are no savings of limitation rights, or of defences based on contractual exemptions, or on personal negligence of claimants. Yet these rights existed in French law before the law of July 15, 1915. I cannot think that law made a clean sweep of them. For instance, I cannot think the right to limit liability given by art. 216 of the Code de Commerce was abolished by the law of July 15, 1915, or that the law of July 15, 1915, gives a seaman, whose personal negligence causes a collision and loss to himself, a right of action for damages against his owner. The French law seems to me to deal only with the incidence of liabilities as between the owners of the two ships in fault, and not to give to the persons injured causes of action which they otherwise would not have. I am, therefore, of opinion that the evidence of Mr. Bodereaux ought to be accepted.

I hold that the owner of the *Yvonne Odette* is exempt from liability to the representatives of the deceased members of the crew of the *Yvonne Odette*. The case, therefore, falls

1920

THE CEDRIC.

Hill J.

within the proviso to s. 3 of the Maritime Conventions Act, and the owners of the *Cedric*, when they pay the life claims, will have no right to contribution.

I therefore confirm the Registrar's report with costs, and I dismiss the defendants' motion with costs.

Solicitors for the plaintiff: *Stokes & Stokes.*

Solicitors for the defendants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

E. C. T.

1920
March 23.

[IN PRIZE.]

THE DROTTNING SOPHIA AND OTHER SHIPS.

[1915. No. 837.]

Prize Court—Practice—Sale pending Action for Condemnation—Investment of Proceeds—Release of Goods on Bail—Payment of Marshal's Expenses of Detention—Prize Court Rules, 1914, *Order* XI., *r.* 3; *Order* XXVI., *r.* 1.

Where goods seized as prize have been sold pending the hearing of the action for condemnation, the Court will not order the proceeds in Court to be placed on deposit or to be invested in the public funds.

Where goods seized as prize have not been sold, but, pending the hearing of the action for condemnation, are released to claimants against a bail bond, the claimants are not required, as a condition of the release, to pay unconditionally the costs and expenses already incurred incident to the seizure and detention of the goods. These costs and expenses are only payable by claimants who obtain a decree in their favour in the condemnation action.

A claimant who has paid the costs and charges incident to the seizure and detention upon receiving delivery of the goods on bail should be given credit for the payment as against the bail, which represents the full value of the goods in the event of their subsequently being condemned, and the bail bond should be framed in terms which give effect to this right.

APPEAL SUMMONS adjourned into Court for judgment.

The claimants, various Scandinavian firms, claimed the release of a number of parcels of goods or their proceeds

seized as prize ex the steamship *Drottning Sophia* and several other ships.

Pending the Crown's action for condemnation the claimants applied to the Registrar for an order (*a*) that the proceeds of sale of the sold parcels should be placed on deposit in the joint names of the claimants and the Procurator-General, or alternatively invested in Government funds; and (*b*) that unsold parcels should be released on bail. The Registrar made both orders.

On applying to fix the amount of bail the claimants asked that the costs of detention should be deducted from the amount of bail so that in the event of condemnation these costs would not fall on the claimants. The Procurator-General appealed to the President in chambers against order (*a*), and the Registrar referred the question of the amount of bail under order (*b*) to the learned President to be dealt with at the same time.

C. W. Lilley (*Sir Gordon Hewart A.-G.* with him) for the Procurator-General.

Sir Robert Aske for the claimants.

Cur. adv. vult.

March 23, 1920. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: In this group of cases certain goods brought in for condemnation as prize and claimed by various claimants have been sold, and the proceeds, amounting to about 85,000*l.*, are in Court. Certain other goods, similarly brought in and claimed, remain unsold in the custody of the Marshal. In these circumstances, application has been made in chambers for directions that the proceeds of sale of the goods first mentioned be placed on deposit in joint names to be agreed, or alternatively invested in the public funds, and that the goods unsold be released to the claimants upon giving security for the ascertained value of the same less the amount of the costs and charges payable on delivery in respect of the seizure and custody thereof.

Upon the application for dealing with the fund in Court

1920

THE DROTTNING SOPHIA.

The President.

an order has been made in the registry, and the Procurator-General appeals. A question of principle is involved. Sir Robert Aske, on behalf of the claimants, admitted at the hearing of the appeal that the order could not be claimed as of right. He contended, however, that such an order is within the discretionary power of the Court and ought on equitable grounds to be made. The Prize Court Rules, 1914, direct that the sale of prize shall be followed by payment into Court of the gross proceeds of sale (Order XI., r. 3; Order I., r. 2); and that funds and moneys paid into Court in prize matters, and securities placed to the credit of such matters, shall be dealt with in the manner in which such moneys or securities are usually dealt with "in the exercise of the ordinary jurisdiction of that Court" (Order XXVI., r. 1). Reference was made before me to the Supreme Court Funds Rules, 1915 (rr. 73 and 74), but in view of the terms of r. 74 (*a*) the provisions there made cannot, I think, be taken to strengthen the case of the claimants upon this application. The question is to be determined upon consideration of the established procedure of this Court and the circumstances of the particular case. The application is novel in character.

It was suggested on behalf of the claimants that an investment which ought to be sanctioned, having regard to the nature and liabilities of the fund, was an investment in Government stocks. Counsel did not, however, take account of the fact that an order for such an investment would have the effect of making the public funds of the United Kingdom chargeable with interest in favour of successful claimants of goods seized as prize, even though the case should prove to be one in which the Court does not think fit to award damages. Interest by way of damages can be awarded against captors under the general jurisdiction of the Court in cases of unjustifiable capture or of misconduct after capture: but there is, I believe, no other ground on which such an award has been customarily made. The common form of order in past times where, between capture and release, sale took place, was, I think, an order for payment out of Court of the proceeds of sale, subject to any proper deductions in respect of costs or expenses.

During wars when prize was by statute or by Order in Council granted to captors an order for investment certainly could not have been made at the discretion of the judge without consent of the parties. Investment in a security of fluctuating capital value might have left captor or claimant exposed to serious risk of receiving a diminished fund or of making good a diminution in value. Having regard to past practice and to the effects which would follow the introduction of orders for investment of prize funds at the instance of either captors or claimants, I am not ready to introduce or adopt a novel procedure in this case. It is true that in *The Kronprins Gustaf Adolf* (1), the President, Sir Samuel Evans, ordered payment of interest by the Crown, but this was done under exceptional circumstances, as Lord Sterndale pointed out in *The Hallingdal.* (2) With the exception of a long delay in bringing the cause to hearing, for which I cannot hold the Crown to be in fault, there are no exceptional circumstances in this case, and the order appealed against must be set aside.

The difficulty which exists in respect of the order sought by the claimants for release against a bail bond of the goods unsold is due to the form of the draft bail bond which they have tendered. The claimants seek a decision upon a question of principle which has lately come under consideration in various instances. They ask that the practice of the Court shall be defined as to cases in which goods under detention in prize are ordered to be released to claimants on bail, and that the terms of the security to be given to the Court shall be so expressed as, in the event of present payment of costs and expenses of detention, to exonerate them and their sureties from further liability. There are certain events of prize proceedings in which the liability for costs and charges and the nature of the security for that liability are already well ascertained. Apart from any exceptional circumstances goods and proceeds of goods which are the subject of proceedings in prize are, according to the ordinary practice of the Court, subject to a charge for costs and charges of seizure

(1) (1917) 2 Br. & Col. P. C. 418. (2) [1919] P. 204, 227.

1920

THE DROTTNING SOPHIA.

The President.

and detention. If the captor obtains a decree of condemnation, his interest in the goods or fund, the subject of the decree, is charged with these costs and expenses. If the claimant succeeds in the cause the decree in his favour leaves him to bear the like burden. In *The Adonis* (1), the Master of the Rolls, Lord Sterndale, recently stated the position to this effect: If goods are condemned the Crown bears the expenses of keeping them out of the fund got by condemnation; where the goods are released the expenses are taken out of the fund which is released; where bail has been given and goods are condemned there is simply an order of condemnation, and no order is made as to the repayment of the expenses, but that has simply been the custom in the Registry, and no case in which the question arose whether it was right has come before either the judge or the Registrar.

The substantial question now at issue is that which was left undecided in *The Adonis* (1), namely, whether a claimant who obtains release on bail of a captured ship or goods should be required as a condition of the release to pay unconditionally the costs and expenses already incurred. On behalf of the Crown it was argued that he should do this in consideration of such advantage as he may derive from having the use of the goods before trial. In theory the amount payable under this bail bond in the event of condemnation is the market value of the ship or goods, and this value—which is subject to the charge already mentioned—is the whole thing in litigation between captor and claimant. I say nothing

(1) 1920. Feb. 9. Unreported. After stating what had been the practice in the registry, his Lordship added: "I wish to make it quite clear that I am giving no opinion at all as to what the decision would be in an ordinary case if the question be raised whether the custom of the Registry up to now has been right. . . . . I wish to make it clear that I express no opinion whatever about it, and I do not think that anything I have said ought to be cited as a precedent in any future proceedings. I wish to leave it entirely open to the President or to the other Judge of the Division to decide whether, where bail has been given in any ordinary case and money paid by the claimant in respect of expenses in order to obtain release, that is or is not to be retained by the Crown."

of costs of the cause. To add to the loss of the confiscable subject the loss of an amount which is properly only a charge upon that subject seems to me inconsistent with the general practice of the Court in relation to the release of captured property. It would also, in my opinion, be inconsistent with the terms of the form of bail bond which is found in Appendix A to the Prize Rules, 1914. The effect of that bond is to provide security for payment by the claimant of "what shall be adjudged against him in the cause with costs." If under such a bond the sureties for a claimant become liable for payment of the full value of the captured property in question, then save as to costs of the litigation they, and consequently he, become liable for no more.

On the whole I come to the conclusion that a claimant who pays costs and charges of seizure and detention upon receiving delivery of goods ought to have credit for the payment as against the security which represents the full value of the goods in the event of his failure in the litigation, and that the bail bond may be expressed in terms which will evidence this right.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimants: *Botterell & Roche.*

E. C. T.

1920
March 29.

[DIVORCE.]

SMITH *v.* SMITH, RUTHERFORD AND OTHERS.

Divorce—Practice—Husband's Petition—Husband suing as Poor Person—Security for Wife's Costs—Divorce Rule 158.

The fact that a husband petitioner for divorce has obtained leave to sue as a poor person does not relieve him from the obligation to give security for his wife's costs. The costs for which security is ordered may in a proper case be limited to such costs as the wife would incur if she had obtained leave to defend as a poor person; but each case must be decided on its own merits.

THIS was a husband's petition for divorce on the ground of his wife's adultery with three co-respondents. The husband presented his petition as a poor person. The wife did not apply for leave to defend as a poor person, but put in an answer denying the adultery. All three co-respondents appeared and denied the adultery. The wife made the usual application for payment of her costs to date and security for future costs. The wife had been turned out of her home by her husband and had taken a cook's place at an hotel, where she was earning 11*s.* 9*d.* a week.

The Registrar made an order that the husband should pay and give security for the costs which the wife would have incurred if she had applied to defend as a poor person—namely, payment of 3*l.* for costs up to setting down and security for 9*l.* for the costs of trial. The husband appealed to the judge to discharge this order. The wife cross-appealed for an increase of the amounts to the usual full costs—namely, 18*l.* and 25*l.* respectively. Both summonses were heard on March 29 in chambers, but adjourned into Court for judgment.

Grazebrook for the petitioner.

Tyndale (*A. W. Goodman* with him) for the respondent.

SIR HENRY DUKE P. This is a husband's petition for divorce on the ground of adultery alleged to have been committed by the wife with the several co-respondents. An order has been made in the Registry under r. 158 of the Divorce

Rules for payment into Court of a sum of money to cover the wife's costs already incurred, and for security to be given by the husband for the estimated amount of her future costs, with a stay of proceedings until compliance.

There are cross-appeals. The husband asks that the order may be discharged; the wife asks that the amounts determined upon by the Registrar shall be increased. The questions raised upon the appeals depend upon the proper effect of the fact that the husband has been admitted to sue as a poor person under the Rules of the Supreme Court (Order XVI., rr. 22–31B) which relate to proceedings by and against poor persons, whereas the wife and the co-respondents appear as ordinary litigants.

Under the usual procedure with regard to wife's costs, where neither party is admitted to sue as a poor person, the suit would almost as of course have been stayed until payment should be made of the wife's taxed costs up to setting down and security given for her estimated costs of the trial. The amounts ordered by the Registrar in this case to be respectively paid and secured are such small amounts as would have been incurred by the wife if she had been admitted to defend as a poor person. No ground has been shown for supposing that she could not have obtained leave so to defend.

On the husband's part this order of the Registrar was objected to on the ground that the suit of a husband suing as a poor person ought not to be stayed pending compliance with an order for security for the wife's costs. On the wife's part it was contended that she is entitled as of right under r. 158 to payment of or security for her ordinary costs of suit, regardless of the fact that the petitioner sues as a poor person. It was also suggested on various grounds that rr. 22–31B of Order XVI. have no effect upon the obligations of a husband petitioner for divorce to provide for the costs of his wife's defence.

It is true that a party who has obtained leave to proceed as a poor person is under ordinary circumstances released from liability to stay of proceedings for failure to give security for costs, even where security would otherwise be ordered:

1920

SMITH v. SMITH AND RUTHERFORD.

The President.

Drennan v. *Andrew* (1); *Biggs* v. *Dagnall* (2); *Willé* v. *St. John.* (3) This immunity, however, does not relieve a husband who is a petitioner for divorce or other relief in a matrimonial cause from the obligation upon which the Divorce Rule 158 is founded to provide according to the directions of the Court such payments as are deemed by the Court to be necessary in order that the wife may not be deprived of justice from being unable for want of funds to appear at the hearing. This obligation has from very remote times been enforced in all Courts having jurisdiction in matrimonial causes in England, and is not discharged by the Rules for Proceedings by and against poor persons. On the other hand the right of the wife who is defendant in such a suit as this to be put in a position to appear at the hearing is not, and never has been, enforced without regard to the conditions under which she is able or can be enabled to defend herself. If she has separate estate that fact is taken into account. If she has other means of securing as of right her ability to appear and defend herself, that fact must be considered in dealing with her application. Whether a wife should obtain an order against a pauper husband for security with a stay on his failure to provide it, is a matter as to which there is no hard-and-fast rule. As was said by Sir Francis Jeune P. in *Richardson* v. *Richardson* (4) each case should be dealt with on its merits; and this view is expressed also in the direction which was given by Sir Samuel Evans P. and Deane J. in *Grinham* v. *Grinham.* (5)

The order made by the learned Registrar is entirely in accordance with the principles which underlie the jurisdiction of the Court, and he is better able than I am to measure the amounts proper to be provided under the circumstances of this particular case. Both appeals are dismissed, and I make no order as to costs.

Solicitor for petitioner: *W. H. House.*

Solicitors for respondent: *James & Charles Dodd, for Harrison & Son, West Hartlepool.*

J. R. B.

(1) (1866) L. R. 1 Ch. 300.
(2) [1895] 1 Q. B. 207.
(3) [1910] 1 Ch. 701.
(4) [1895] P. 276, 280.
(5) [1916] P. 1.

(In Prize.)

1920
March 30.

THE CAIRNSMORE. THE GUNDA.

[1915. Nos. 690 and 716.]

Prize Court—Release of Cargo—Marshal's Expenses—Cost of Insurance—Prize Court Rules, 1914, *Order* xiii., *r.* 6.

Claimants to goods seized as prize and subsequently released in accordance with Order xiii., r. 6, of the Prize Court Rules, 1914 (1) are not chargeable, as part of the expenses of detention, with the cost of the insurance on the goods effected by the Marshal under an agreement with a body of underwriters whereby all ships and goods brought into the custody of the Marshal as prize were insured against loss by fire, aircraft and bombardment.

Motion for an order that the claimants were not liable to pay the premiums for insurances effected by the Marshal against fire, aircraft and bombardment, on certain goods released to the claimants.

The claimants, Ballins Sonner & Co., of Copenhagen, were the owners of a quantity of quebracho logs seized as prize ex the sailing vessels *Cairnsmore* and *Gunda* in August, 1915. The Crown's claim for condemnation came before the Prize Court in July, 1916, and the goods were ordered to be released, but the claimants were unable to get ships to remove the logs and they remained in the Albert Dock, Leith, until 1918, when arrangements were made for their disposal. In January, 1919, the claimants were successful in selling 700 tons of the

(1) Order xiii., r. 6, provides that "the release shall be lodged with the Marshal by the party upon whose application it has been issued, and thereupon, upon payment to the Marshal of all fees due to and charges incurred by him in respect of the property by the party upon whose application the release has been issued, unless the Judge shall otherwise order, the property shall be at once released."

By Order xxvii. r. 2, "where the Judge decrees property taken or seized as prize to be restored to the owner thereof the decree shall be carried out by means of a release as prescribed in Order xiii.: Provided that the Judge may order such release upon such terms as to the payment of costs and expenses and freight (if any is due), or otherwise, as to the Judge may seem just. . . . ."

1920

THE CAIRNSMORE.

THE GUNDA.

logs, and towards the end of February the purchasers were prepared to take delivery, but the Marshal declined to instruct the collector of Customs at Leith to give delivery until the claimants had given an undertaking to pay all his charges, including the costs of insurance, and in order to obtain delivery the undertaking was given.

In July, 1919, a similar undertaking was given when the remainder of the logs were sold.

The claimants paid the amount due to the Marshal for the expenses of warehousing the cargoes and all the other charges except the sums claimed for insurance premiums amounting to 910*l.* 4*s.*, which they declined to pay. The premiums covered the period from August 12, 1915, to July 24, 1916, the date of the decree releasing the goods, and from July 24, 1916, to January 27 and July 31, 1919, the dates on which the formal orders for release were obtained from the Marshal.

Sir Erle Richards K.C. and *L. F. C. Darby* for the claimants. The insurances effected under the Marshal's open cover were in the interest of the Crown as captors, and not in the interest of the claimants who were never consulted and never requested the Marshal to insure the goods. The Marshal is bound to keep goods seized as prize "in salva et arcta custodia": see Story's Principles and Practice of Prize Courts, p. 46. The Marshal insured for his own protection, and in *The Catherine and Anna* (1) Lord Stowell held that premiums of insurance on a ship, paid by a captor for his own security, were not chargeable against the owners on a decree for restitution on payment of the captor's expenses. That case, decided in 1801, is exactly in point, and the law has not changed since: see *The Südmark* (2), where the Privy Council held that there was no obligation on the part of the Marshal to insure for the benefit of cargo owners. Further, there was no contract between the parties as to insurance: cf. *Martineau* v. *Kitching*. (3)

Theobald Mathew (*Sir Gordon Hewart A.-G.* with him) for the Procurator-General. There was an implied promise on the

(1) (1801) 4 C. Rob. 39. (2) [1918] A. C. 475, 484.
(3) (1872) L. R. 7 Q. B. 436.

part of the claimants to pay these charges as they are the parties interested. If the goods had not been insured, and they had been lost by fire without negligence after the Prize Court had ordered their release, the loss would have fallen on the claimants, and they then would have complained that, as a reasonable man, the Marshal ought to have insured. They did not insure the goods themselves because they knew that the goods were insured under the Marshal's floating policy. It cannot be contested that it was reasonable for the Marshal to insure, and the cost, therefore, is recoverable against the claimants as a reasonable expense incurred in connection with the goods: *The Franciska.* (1) The Marshal, representing the Crown, is only responsible for due diligence: *The William* (2); *The Ostsee* (3), and is under no obligation to insure for the benefit of claimants: *The Südmark* (4); but the test is not what expense was he under an obligation to incur, but what expense was it reasonable to incur. The distinction between *The Catherine and Anna* (5) and the present case is that in 1801 the captors themselves were the parties concerned and therefore, of course, insured for their own benefit. In fact however, as appears from the correspondence, the claimants undertook to pay these charges and are estopped from contending that they are under no legal obligation to pay them.

Sir Erle Richards K.C. replied.

THE PRESIDENT (SIR HENRY DUKE). This case raises a question of principle, and a question probably of some importance in point of practice, but I have a clear view about it, and I therefore propose now to state the conclusion at which I have arrived.

The facts are these: Early in the war there was a seizure at sea of a large consignment of quebracho wood. The wood was brought into the custody of the Marshal and landed at the Port of Leith. It lay in the Port of Leith in the premises of the Port Authority there—the Leith Harbour Commissioners—

(1) (1856) 10 Moo. P. C. 73.
(2) (1806) 6 C. Rob. 316.
(3) (1855) 9 Moo. P. C. 150.
(4) [1918] A. C. 475, 484.
(5) 4 C. Rob. 39.

1920

THE CAIRNSMORE.

THE GUNDA.

The President.

for a period of something like four years. The suit for condemnation was heard in July, 1916, and the late President, Sir Samuel Evans, decreed the release of the cargo. It was not convenient to the cargo owners to take delivery of the cargo, and at some inconvenience to those who had the custody of it, they left it lying upon the premises of the Harbour Commissioners at Leith until they could find purchasers or find tonnage to remove the timber elsewhere.

When the cargo was brought in, the goods came within the operation of an insurance agreement which had been made between the Marshal and a body of underwriters. It was an agreement which covered all ships and goods brought into the custody of the Marshal as prize, including, among other things, insurance against fire. The particular insurance here in question was an insurance against the risk of fire, but there was also an insurance against the risk of destruction by air raids. The Marshal had succeeded early in the war in effecting agreements for insurances upon what appeared to be advantageous terms, with provisions that the costs of insurances should be payable at the time of condemnation of the goods or at the time of the release of the goods, or, in the case of sale intermediately under an interlocutory order, upon the execution of the order for the sale of the goods. The Marshal incurred those expenses; he made his arrangements at the instance of the Lords of the Admiralty, and with the approval of the Treasury; and, as Mr. Mathew has said, it was a perfectly reasonable and sensible arrangement. It was an expenditure which it was very reasonable to make. In a large number of cases it is said that the persons who were interested in property seized as prize have been content, when the time for payment came, that the costs of the insurance should be paid out of the proceeds of the property. If the goods were condemned the public funds bore the costs of the insurance; if released the goods owners submitted to the payment; but I cannot attach any importance to a course of procedure in Prize limited to a period of three or four years. Something much more effective in its operation must be found than a short course of practice of that kind. When the owners

1920

THE CAIRNS-MORE.

THE GUNDA.

The President.

of these goods, years after the order for the release, came to claim the goods and found that there was a sum of nearly 1000*l.* said to have been paid for insurance, or in fact payable for insurance out of public funds, they demurred to meeting that charge out of the value of the goods, and the question which is raised on this motion is whether they are bound to do so. The Marshal, dealing with the matter in the way in which he dealt with other cases of the kind, treated it as a charge which it was reasonable and proper to make in the circumstances as they existed, having regard to the care of the goods and the risks which existed at the time of the transaction, and he insisted that the charge must be paid as a condition precedent to the delivery up of the goods. If that were a rightful insistence well and good; if it were not a rightful insistence then it was duress by distraint of the goods, and acquiescence under that duress by the owners of the goods does not have any operation in point of law.

It is said first that whatever the legal position may be, the claimants consented to the payment; and that having consented to it—and in a manner derived the benefit of it—they must submit to repay the money. If they had acquiesced I should insist on their making good the obligation which they had incurred, but when I look at the transaction there is not the least sign of acquiescence. There is a mistake in the quotation from a letter of the claimants. At the end of the year 1918 they had written saying that they would be ready to pay the charges of detention, and thereupon a letter was written saying that they had said that they would be ready to pay the charges of detention and insurance—a pure misstatement, by which they cannot be bound. In the February following they were told point blank "Unless you pay the Marshal's charges, including insurance, these goods will not be released," and, seeing that those having the custody of the goods might continue to hold them until the expenses were paid, they thereupon, like sensible business people, said: "Very well; under these circumstances we will pay." But every payment of that kind is made with a reservation of the legal rights of the parties.

1920

THE CAIRNSMORE.

THE GUNDA.

The President.

What is the legal position ? First it is necessary to consider it apart from authority of cases. What was the position of the Marshal ? The Marshal was the officer of the Crown to hold these goods, and he was bound—as has been recognized in various decisions and works of authority—to hold them with due care in safe custody. He had to exercise a necessary diligence in the safe custody of the goods, and that put on him a very considerable obligation, an obligation which this Court would enforce if, by reason of any negligence of the Marshal, the goods were lost. It was enforced against captors when they had the custody of the goods, and I cannot have any doubt that it must be enforced upon the same principles in the case of the Marshal. The Crown is in truth the captor and the custodian, and the Crown places the goods in the custody of the Marshal. In *The Südmark* (1) the goods were placed in the custody of the military officer who acted as custodian for the Crown, and by international law his custody had to be a diligent safe and fair custody. That is an obligation which the Marshal incurs. He runs a risk, and if he protects himself in respect of that risk by insurance it is a perfectly reasonable thing on his part, but it cannot be pretended that he insures for the behoof and at the cost of some third parties. The mere fact of the insurance being effected therefore does not, as it seems to me, as a matter of reason, involve a liability on the part of the claimants—the previous owners of the goods—to pay for the insurance.

To take the matter a little further, it has to be considered whether there is a practice of the Court which places the cost of insurance upon the owner of the goods. Lord Stowell said there was not, and that would have been authority enough if nothing had happened in the meantime either by change in the law or change in the state of the facts to necessitate a departure from the rule so laid down. But during the war, in 1918, the Board of the Privy Council has declared the law to the same purport as it was declared by Lord Stowell. Therefore it is not generally the law that where the captor effects an insurance on goods it is effected at the cost of the

(1) [1918] A. C. 475.

owner of the goods. What else is there ? It is not the general law, it does not arise from reason, nor from the practice of the Court, and those who support this claim and put the cost upon the goods owner must found it upon either an express or an implied request. I have come to the conclusion that there was no express request, and I cannot see any ground upon which I could imply a request. Every ground for implying a request seems to be taken from the case by the settled practice of the Court and by the judgments of Lord Stowell and of the Privy Council which show that in the reason of the matter there are no facts upon which in such a case as this a request can be implied.

I come to the conclusion that these goods ought to be released without payment of these charges, and I declare accordingly. The motion will be allowed with costs.

Solicitors for the claimants : *Thomas Cooper & Co.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. T.

1920
March 31.

[ADMIRALTY.]

(In Prize.)

THE PRINS DER NEDERLANDEN.

[1915. No. 842.]

Prize Court—Carriage of Contraband—Innocent Shipowners—Discretion to award Freight.

Although the general rule is that neutral shipowners are not entitled to payment of freight in respect of the carriage of contraband, the Court has a discretion which it can exercise in favour of innocent shipowners in exceptional circumstances.

Where foodstuffs consigned to the Netherlands Overseas Trust on a neutral ship had been condemned as contraband but the shipowners before the cargo was loaded had informed the British authorities of the proposed shipment, and satisfied the Court that they had no knowledge of the real destination of the cargo and were in no way party to the contraband transaction, the Court exercised its discretion in their favour, and decreed payment of freight.

Shipowners' Claim for freight.

The claimants were the Royal West Indian Mail Steamship Co. of Amsterdam, the owners of the steamship *Prins der Nederlanden*. The claim was in respect of freight on the carriage of 1500 bales of cocoa from Las Palmas to Amsterdam. It appeared from the claimant's affidavit that in July, 1915, their company agreed with a firm of cocoa merchants in Amsterdam, Messrs. P. Onnes & Zoon, to send a vessel to Las Palmas to load the 1500 bales of cocoa for their account, and it was a condition of the agreement that the cocoa should be consigned to the Netherlands Overseas Trust Co. at Amsterdam, and that Onnes & Zoon should produce to the claimants the certificate of the Trust that the cocoa was so consigned with their approval and permission. The goods had been brought to Las Palmas in a German vessel bound for Hamburg, which took refuge at Las Palmas on the outbreak of war, and the German owners of the parcels of cocoa in question had purported to sell it to Messrs. Onnes & Zoon. Messrs. Onnes & Zoon forwarded the certificates of the

1920

THE PRINS DER NEDERLANDEN.

Netherlands Overseas Trust Co. to the claimants, who also received a confirmation from the Trust themselves that no delivery of any parcels of cocoa ex the *Prins der Nederlanden* might be made without their instructions. Thereupon the claimants, through their London agents, informed the director of the Trade Division of the Admiralty of the intention to divert the vessel to Las Palmas to load the cocoa, and kept him informed of the subsequent movement of the vessel and of the cargo laden on board, and forwarded copies of the manifests for his inspection. The *Prins der Nederlanden* loaded the parcels in question together with other consignments of cocoa, and in the course of her voyage to Amsterdam put into the Downs. There her cargo was examined, and she was detained, but was allowed to proceed on the claimants giving a guarantee to return various parcels of cocoa for Prize Court proceedings. The required guarantee was given, and the parcels of cocoa were duly returned in other vessels, in respect of which the claimants paid freight amounting to 288*l.* 13*s.* 5*d.* The parcels of cocoa shipped for the account of Messrs. Onnes & Zoon were ultimately condemned as prize.

The claimants alleged that they did not know, nor had they any reason to suspect, that any of the cocoa had an ultimate enemy destination, and they claimed to be paid the freight which they would have received if the parcels in question had been carried to Amsterdam.

Darby for the claimants. Before the claimants consented to carry the cargo they insisted that it should be consigned to the Netherlands Overseas Trust Co., and they kept the British authorities fully informed of all the circumstances and of the movements of the *Prins der Nederlanden*. No objection was taken, and the cargo in effect therefore was carried under an implied licence from the Admiralty. The scheme by which it was proposed by the German owners of the cocoa to get it into Germany was an extremely skilful one, which even deceived the Netherlands Overseas Trust Co. as well as the claimants, who were entirely innocent parties.

1920

THE PRINS DER NEDERLANDEN.

In *The Neptunus* (1) Lord Stowell awarded freight for the carriage of a cargo which included a small quantity of contraband items: see also *The Sarah Christina* (2) and *The Emanuel.* (3) [He was stopped.]

Harold Murphy (*Branson* with him) for the Procurator-General. Although there is no affirmative evidence of guilty knowledge on the part of the claimants, the mere fact that the cargo was transhipped from a German vessel whose destination, but for the outbreak of the war, was Hamburg, should have aroused the claimant's suspicions and put them on inquiry. The rule laid down by Sir Samuel Evans in *The Jeanne* (4), after full argument, is correct—namely, that no freight is payable on the carriage of contraband even if the shipowners are innocent parties and unaware of the proposed ultimate enemy destination of the cargo: see also *The Oster Risoer.* (5) *The Peterhoff* (6) is also a clear American authority to the same effect. In no case for over 100 years has freight been granted in respect of the carriage of contraband. In *The Neptunus* (1) there was a general award on the carriage of a cargo which happened to include a minute quantity of contraband sailcloth. This was a case of de minimis non curat lex, and is no authority for the granting of freight under such circumstances as the present.

[DUKE P. Counsel for the Crown in *The Jeanne* (4) admitted that the Court had a discretion in the matter.]

The discretion would only be exercised in very exceptional circumstances such as existed in *The Neptunus* (1), where the whole cargo, with but a very small exception, was innocent. Further, in the present case it would appear that according to the terms of the charter and bills of lading, the shipowners can recover their freight from Onnes & Zoon, notwithstanding that the cargo was not carried to its destination.

Darby replied.

THE PRESIDENT (SIR HENRY DUKE). In this case the Royal West Indian Mail Steamship Co. of Amsterdam are

(1) (1800) 3 C. Rob. 108.
(2) (1799) 1 C. Rob. 237.
(3) (1799) 1 C. Rob. 296.
(4) [1917] P. 8.
(5) (1802) 4 C. Rob. 199.
(6) (1866) 5 Wall, 28.

1920

THE PRINS DER NEDERLANDEN.

The President.

the claimants in respect of freight upon goods which have been condemned by a decree of the Court. The goods in question were a considerable parcel of cocoa beans, which, at the outbreak of the war, were on board a German vessel destined for Hamburg. Upon the outbreak of war the German vessel took refuge in a neutral port, and ultimately there was a sale of the cargo of cocoa beans—voluntarily interned in that way—by the German owners to a firm of Onnes & Zoon of Amsterdam ; a neutral firm, and prima facie a good sale. After investigation in *The Rijn* (1) in this Court, it was disclosed that although the case was apparently that of sale and purchase between an enemy in a neutral port and Onnes & Zoon, it was in fact a colourable sale by a German firm for the account of a German firm, and it was discovered that the goods which were the subject of that sale were on their way in the *Rijn* to Amsterdam with a view to transit into Germany for the account of the German owners. In the present case the goods were on board the *Prins der Nederlanden* for conveyance to Amsterdam for delivery to Onnes & Zoon. Both parcels of the original cargo were condemned.

The question in this case is whether the claimants are disentitled to recover freight—or, rather, to have an award of freight made in their favour—in respect of the carriage of these goods by reason of the fact that they were contraband in the course of transit to an enemy base of supplies. It was found in *The Rijn* (1), and it was the basis of the judgment in this case, that the cocoa beans were in fact destined by the pretended vendors on German account and by the pretended purchasers on German account, for ultimate delivery at Hamburg for the use of the forces of the then German Empire.

There is no question of the existence of a general rule that the shipowner who carries contraband has no right to a decree of the Prize Court for payment of freight in respect of contraband so carried. That rests upon principle. The question of liability to confiscation for contraband dealings was discussed many times before Lord Stowell ; it has been discussed

(1) [1917] P. 145.

1920

THE PRINS DER NEDERLANDEN.

The President.

many times since the outbreak of the great war; and one principle clearly emerges—namely, that a shipowner who knowingly engages in the carriage of contraband, when the nature of the transaction has been discovered upon investigation in a Prize Court, is subject to condemnation of his ship; and if the transaction is not such as to involve condemnation of the ship he is held to have forfeited a claim to remuneration for the freight that would otherwise be due in respect of the contraband goods. Various authorities were referred to which illustrate that proposition. It is not necessary to consider the proposition so far as it relates to the liability of confiscation of the ship. That has been recently dealt with and decided upon authoritative grounds in *The Hakan* (1) in the Privy Council. So far as relates to the loss of freight upon the goods, the decision which is relied on here on the part of the Crown is the decision of Sir Samuel Evans in *The Jeanne*. (2) The headnote of that case lays down the proposition, which is drawn from a variety of cases in the older reports, in these words: "Neutral shipowners are not entitled to freight in respect of the carriage of contraband." On behalf of the Crown it is said that that is in substance a decision, that in any event, whether there be knowledge or not, the shipowner who is found to have carried contraband must be held to have forfeited his claim to freight. It is said on behalf of the shipowner that Lord Stowell made it clear by his decision in at any rate one reported case—that of *The Neptunus* (3)—and by his observations in various cases that knowledge is a material ingredient among the factors which determine the decision of the Court in such cases. I am not sure that the decision in *The Neptunus* (3) is expressly in point in this case, nor am I sure that the decision in *The Jeanne* (2) covers it. I do not think it does. I think, on the whole, that the case is not expressly covered by authority. With regard to *The Jeanne* (2), I think that I am bound to take notice of the submission which was made on the part of the Crown by learned counsel who appeared for the Crown,

(1) [1918] A. C. 148. (2) [1917] P. 8.
(3) 3 C. Rob. 108.

1920

THE PRINS DER NEDERLANDEN.

The President.

Sir Maurice Hill (now Hill J.), and who, after consideration of the authorities, said this: "It is not suggested that the rule" —that is forfeiture of the right to claim—" is a binding rule which the Court must apply. The Court has a discretion which it can exercise in exceptional circumstances." I take that to be a correct submission, and I do not find that the learned judge, the then President, in his decision of the case has derogated in any way from the principle upon which the claim of the Crown there proceeded. The general rule is that the carriage of contraband forfeits the right to freight, but there is a higher rule than that, and it is that the Court must do justice. I have to see in this case whether there is any ground of justice, either upon fact or upon presumption, upon which it ought to be held that this shipowner has forfeited his claim to have freight for these goods—that is, has forfeited the right to come to the Court and to ask the Court upon recognizing his innocence of complicity in a contraband transaction to direct that he shall receive payment of freight. I put the power of the Court no higher than that. I do not conceive that there is, indeed I conceive that there is not, power in the Court to award freight to a shipowner who is knowingly a party to a contraband transaction. On the other hand, I conceive that there is power in the Court to award freight to a shipowner who unknowingly carries contraband, and who is not a party in intent to a contraband transaction.

I now have to consider the facts to see whether this shipowner knowingly carried contraband, or whether, on the other hand, he has satisfied the Court in an affirmative sense that he was no party to the contraband transaction, and that what proved to be contraband and to be enemy property in this case was not by him carried knowingly. It is admitted on the part of the Crown that the shipowner was unaware of the contraband character of these goods. There was a skilful device or plan which deceived the shipowner, deceived the Netherlands Overseas Trust Co., and might have deceived a great many other people, but which was exposed by a careful inquiry before Sir Samuel Evans, with the result that condemnation was decreed. The shipowner was innocent. It

1920

THE PRINS DER NEDERLANDEN.

The President.

is said on the part of the Crown that first of all there is the absolute rule that the Court has no power to award him freight. It is said, further, that in the exercise of its discretion the Court should not award him freight. It is said : "Examine the charterparty and bill of lading here, and it will appear that the shipowner has a remedy against the shipper." If this were a clear case in which the shipowner had a remedy against the shipper, I do not say that I would not leave him to his remedy. I have looked at the documents, and I am not satisfied that he had. I do not find that clearly he had, and so I do not proceed on the footing that he had a remedy. In that state of the case, what ought I to do? It seems to me that he has been engaged in this transaction innocently and without knowledge of its contraband nature; that the goods have been carried; that the captor has derived advantage from the carriage of the goods; and that the sale price of the goods was increased by the service innocently rendered by the shipowner. Under these circumstances, in the exercise of my discretion, I declare that discretion to be exercised in favour of the shipowner, who has proved his innocence of complicity in a contraband transaction, and I decree payment of the freight.

Solicitors for the claimants : *Pritchard & Son.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. T.

[ADMIRALTY.]

1920
April 19, 26.

THE ESPANOLETO.

[1918, fol. 934.]

Admiralty—Practice—Writ in rem—Res not within Jurisdiction—Renewal of Writ—Extension of Time—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8—*Order* VIII., *r.* 1.

It is not necessary that, at the time of the issue of a writ in rem, the res should be within the jurisdiction of the Court; and s. 8 of the Maritime Conventions Act, 1911, which provides that in the case of collision or salvage actions the proceedings must be commenced within two years of the cause of action, is complied with if the writ is issued within two years: the section does not contemplate that the arrest of the res constitutes the commencement of the proceedings.

In general, the Court will not grant an extension of time for the renewal of an unserved writ, which has not been renewed within the period of one year as provided by Order VIII., r. 1, if, but for the extension of time, the claim would be barred by a statute of limitation. But, inasmuch as s. 8 of the Maritime Conventions Act contains provisos for extension of time unknown to any other statutes of limitation, the application to renew a writ in an action which comes within the operation of s. 8 must be considered on its merits, and if, under the circumstances, the Court would give leave to issue a writ notwithstanding the lapse of two years, the Court will allow an extension of time for the renewal of a writ, the time for the renewal of which has expired.

MOTION to set aside a writ and warrant of arrest.

The plaintiff, the widow of the master of the steamship *Artisan*, claimed damages under Lord Campbell's Act in respect of the death of her husband through a collision between the *Artisan* and the defendants' steamship *Espanoleto*.

The collision took place on February 20, 1917, and the plaintiff issued her writ in rem on December 13, 1918. It was not served as the *Espanoleto* had left the jurisdiction, and was not renewed within twelve months in accordance with Order VIII., r. 1. No application for renewal was made until March 19, 1920, when the *Espanoleto* having come within the jurisdiction, an application was made ex parte, and leave was granted and a warrant of arrest issued.

The defendants now moved to set aside the writ and the

1920

THE ESPANOLETO.

renewal and the warrant of arrest on the grounds (*a*) that a writ in rem cannot be issued unless at the time of issue the res is within the jurisdiction; (*b*) that s. 8 of the Maritime Conventions Act, under which actions are not maintainable unless brought within two years, contemplates that proceedings should be commenced by arrest; and (*c*) that if the writ was good the plaintiff was not entitled to a renewal of it, as by that time two years had elapsed from the date of the cause of action, and under s. 8 the claim was statute barred. The arguments sufficiently appear from the judgment.

Langton for the plaintiff.
Alfred Bucknill and *R. F. Hayward* for the defendants.

HILL J. The plaintiff is the widow of the master of the steamship *Artisan*, who lost his life by reason of a collision between the defendants' steamship *Espanoleto* and the *Artisan* on February 20, 1917. On December 13, 1918, the plaintiff issued a writ in rem against the *Espanoleto*. It was not served, and no warrant of arrest was applied for. It was not served, because by that time the *Espanoleto* had left the jurisdiction. The writ was not renewed within twelve months, the proper time, and on March 19, 1920, the plaintiff applied ex parte for leave to renew the writ. She obtained that leave, and caused a warrant of arrest to issue, the *Espanoleto* having by that time come within the jurisdiction. On the following day conditional appearance was entered, and an undertaking to put in bail given. At the time when I granted, ex parte, leave to renew the writ, I was aware that there might be a question arising under s. 8 of the Maritime Conventions Act, 1911, which it would be proper for the Court to consider, and that order being made ex parte, it was of course open to the defendants to say that the order for renewal had been wrongly made, and that it ought to be set aside. That is one of the objections they have taken on this motion, and which I have to consider.

It is a motion by the defendants to set aside the writ and the renewal and the warrant of arrest and to discharge the

undertaking to put in bail. The first ground of objection is that the arrest is invalid, because there was no valid writ in existence at the time of the arrest. If the writ is bad, there is, of course, nothing to support the warrant of arrest. A preliminary objection was taken on the hearing that the original writ was bad, because, it was said, a writ in rem cannot be issued unless at the time of issue the res is within the jurisdiction. No authority is given for that proposition, and I think the point is a bad one. Of course, a writ in rem cannot be served till the res comes within the jurisdiction, but I can see no reason why the writ cannot be issued and then served when the res comes within the jurisdiction.

The other objections turn on the Maritime Conventions Act. The point was taken, to keep it alive in case the matter should go further, that s. 8 of that Act does not, in respect of life claims, repeal the one year's limitation prescribed by Lord Campbell's Act. If that were right and the one year's limitation under Lord Campbell's Act still applied to a writ against the ship, then inasmuch as the collision happened on February 20, 1917, and the original writ was not issued until December 13, 1918, the objection would have been a good one. But the point was decided in *The Caliph* (1) against the defendants' contention, and I follow that decision. Having regard to ss. 3, 5, and 8 of the Maritime Conventions Act, I do not desire to express any opinion different from *The Caliph* (1), but in any case I should follow that decision.

The next contention was that the proceedings were not commenced within two years under s. 8, because that section contemplates that proceedings should be commenced not by issuing a writ but by arrest. I do not agree. Sect. 8 relates to proceedings in personam as well as to proceedings in rem. It is an English statute, and in English law it is well understood that proceedings are commenced by the issue of a writ. Order I., r. 1, and Order II., r. 1, of the Rules of the Supreme Court, show that an action in the Admiralty Division, like

(1) [1912] P. 213.

1920

THE ESPANOLETO.

HILL J.

an action in any other Division, is commenced by the issue of a writ, and I can see no reason at all for giving a different meaning to the commencement of proceedings under s. 8 from that which obtains in every other action.

That brings me to the real point in the case: Was the plaintiff entitled to a renewal of the writ, the twelve months having expired and expired some time? The original writ was issued within two years, but it was not renewed within the proper time. The Court has power to extend the time and to give leave to renew. That is quite clear from the decision in *In re Jones* (1) and the cases I am about to mention. Whether the leave should be granted after the time has expired must depend, like every other question of granting an extension of time, upon the circumstances of the particular case. In general, leave will not be granted if, but for the enlargement of time, the plaintiff's claim would be barred by a statute of limitations. That is to say, it will not be granted to revive a barred cause of action: see *Doyle* v. *Kaufman* (2); and, with reference to that case, *Smallpage* v. *Tonge* (3), and especially *Hewett* v. *Barr*. (4) In general the Court must not by renewal deprive a defendant of an existing right to the benefit of a statute of limitations. But s. 8 of the Maritime Conventions Act is a limitation section of a very peculiar kind, for it contains a proviso unknown to any other statute of limitations; in one event—namely, if there has not been any reasonable opportunity of arresting the defendant vessel within the period—it directs the extension of the limited period of two years, and further gives the Court power to extend it on any other sufficient grounds.

In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within s. 8 is made, the matter is not to be disposed of merely by saying that the two years have elapsed and the claim is statute barred and no renewal can be granted. The application to renew must be considered on its merits, and the Court must inquire

(1) (1877) 25 W. R. 303.
(2) (1877) 3 Q. B. D. 7, 340.
(3) (1886) 17 Q. B. D. 644, 648.
(4) [1891] 1 Q. B. 98.

whether the circumstances are such that the Court would give leave to issue a writ, notwithstanding that the time had expired.

In the present case affidavits were filed, from which the following facts appear: The collision was in February, 1917, and the *Espanoleto* for the first time came within the jurisdiction on October 24, 1918. On October 25, 1918, the owners of the *Artisan* issued a writ against the owners of the *Espanoleto*, and caused her to be arrested. On November 20, 1918, in that action, an undertaking to appear was given and consent made to the vessel's release. On December 3, 1918, instructions to the solicitors for the present plaintiff in her action were given. It is said that there is a letter written a week or two earlier instructing them that there would be a claim, but an affidavit shows that the solicitors received the instructions on December 3 to present the claim, and they then requested that the name and address of the plaintiff should be cabled to them to enable them to issue the writ. That information was obtained on December 13, 1918, and upon that day the plaintiff's writ was issued. But in the meantime, on December 11, 1918, the *Espanoleto* had sailed, and left the jurisdiction. The *Espanoleto* was not again within the jurisdiction until March, 1920, when the renewal was applied for and obtained, and the warrant of arrest granted.

The question, to my mind, is whether, in these circumstances, first, the case comes within the obligatory part of the proviso, and, secondly, if it does not, ought I to exercise my discretion in favour of the plaintiff? I think it is not absolutely certain that the case does not come within the obligatory part of the proviso, because I am not at all sure, on the facts as stated, that the plaintiff had had a reasonable opportunity of arresting the ship. But whether that is so or not, I think I ought to exercise my discretion in favour of the plaintiff. If she had applied for leave to issue a writ in March, 1920, I should have granted it. I think, therefore, a fortiori, I should grant renewal of the writ which she had originally issued in December, 1918.

I therefore make an order in favour of the plaintiff extending

1920

THE ESPANOLETO.

Hill J.

the time, and the effect of that is that the defendants' motion is dismissed with costs.

Solicitors for the plaintiff: *W. A. Crump & Son.*

Solicitors for the defendants: *Pritchard & Sons for Batesons, Warr & Wimshurst, Liverpool.*

E. C. T.

1920

April 26; *May* 3.

[ADMIRALTY.]

THE DISPERSER.

[1919, fol. 266.]

Admiralty—Limitation of Liability—Time for bringing in Claims—Statutory Limitation of Time—Discretion to extend Time—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Maritime Conventions Act,* 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

A decree of limitation of liability under ss. 503 and 504 of the Merchant Shipping Act, 1894, under which all claims against the limitation fund are ordered to be brought in within a certain time (usually three months) does not override the provisions of s. 8 of the Maritime Conventions Act, 1911, and rival claimants to the limitation fund are entitled to object, if more than two years have elapsed since the cause of action, to the claims of persons who have not commenced proceedings within the statutory period of two years provided for in the Maritime Conventions Act.

Generally speaking, however, if the cause for not issuing a writ in respect of the damage sustained has been the fact that limitation proceedings are pending, that would be sufficient ground for the exercise of the discretion vested in the Court under s. 8 to extend the time for the issue of a writ notwithstanding that the period of two years has expired.

MOTION in objection to the Registrar's report.

On October 31, 1916, a collision took place between the steamship *Caledonia* and the lighter *The Marshalls* in tow of the steamship *Disperser*. Both the *Caledonia* and *The Marshalls* received damage. The owners of the *Caledonia* sued the owner of the *Disperser*, and on March 27, 1918, the

1920

THE DISPERSER.

Disperser was held alone to blame. The damage to the *Caledonia* exceeding the amount of the statutory liability of the *Disperser*, calculated in accordance with the provisions of s. 503 of the Merchant Shipping Act, 1894, the owner of the *Disperser* issued a writ on May 6, 1919, in a limitation action; and on July 14, 1919, under the decree limiting his liability to an amount not exceeding 8*l.* per ton on the registered tonnage of the *Disperser*—namely, 1122*l.* 2*s.*—it was ordered that all claims against the fund were to be brought in within three months. Thereupon the charterers of *The Marshalls* filed a claim in respect of the damage to the lighter. At the reference the owners of the *Caledonia* objected to the claim on the ground that the proceedings not having been commenced within two years from the date of the cause of action, under s. 8 of the Maritime Conventions Act the claim was not maintainable. The Registrar upheld the objection. The charterers of *The Marshalls* moved in objection to the report.

Balloch for the charterers of *The Marshalls*. Once a decree of limitation has been made under s. 503 the fund is the thing that is liable; the owner is no longer interested, he cannot be sued, and it is not necessary for the foundation of liability that an action should previously have been brought, or that any fresh action should be entered. In fact, after the decree of limitation, no actions can be brought except in those proceedings (s. 504). If the decision of the Registrar is correct a wrongdoer would escape liability, for if rival claimants can raise the defence of s. 8 of the Maritime Conventions Act, the wrongdoing owner, who has limited his liability, might do so. Further, if the decree were made shortly before the two years from the date of the collision expired, it would be necessary for all claimants to the fund to put in writs for fear of being statute barred. The true view is that when a decree of limitation has been made all claimants have the time provided for in the decree in which to lodge their claims, whether in fact they have instituted proceedings or not. If, however, the Court is of opinion that s. 8 applies, the case is clearly one

1920

THE DISPERSER.

for the exercise of the discretion allowed in the proviso to s. 8 to extend the time notwithstanding that the two years have elapsed.

Langton for the owners of the *Caledonia*. Sect. 503 of the Merchant Shipping Act merely provides for the limitation of quantum, and does not affect the rights of the parties. It does not purge the offence of the wrongdoing shipowner, and put him in the same position as if no negligence had been committed: *The Ettrick* (1); nor does it prevent other actions being brought against him: *Van Eijck and Zoon* v. *Somerville*. (2) Rights of action are governed and limited by the Maritime Conventions Act. On the facts there are no merits in the claim on behalf of the charterers of *The Marshalls*, and their action being statute barred the Court should not exercise its discretion in their favour.

Balloch in reply. *Van Eijck and Zoon* v. *Somerville* (2) is merely authority for the proposition that a cargo owner is not precluded from showing the real value of a ship by reason of a finding of value in a collision action between respective owners, one of whom has limited his liability. It is no authority for the suggestion that actions arising out of the collision can be brought against the limiting owner except in the limitation proceedings—i.e., against the fund in Court.

HILL J. This case raises a question, which is not altogether easy, as to the relation between s. 8 of the Maritime Conventions Act, 1911, and the effect of a decree in a limitation suit. The collision happened between the steamship *Caledonia* and the lighter *The Marshalls*, which was in tow of the steamship *Disperser*. The fault was in the *Disperser*. There was damage to *The Marshalls* and the *Caledonia*. The *Disperser* was owned by Mr. W. H. Loveridge. *The Marshalls*, as has been found by the Registrar, was under demise to a syndicate or partnership, of which Mr. Loveridge was a member. At the reference which took place the *Caledonia's* claim was agreed at 1053*l*. 6*s*. 5*d*. The Registrar has found that the extent of the damage to *The Marshalls*, measured in money, after

(1) (1881) 6 P. D. 127. (2) [1906] A. C. 489.

excluding Mr. Loveridge's interest, was 388*l.* 8*s.* 2*d.* That brings the total claims to over 1400*l.*

A limitation suit was brought by the owner of the *Disperser*, Mr. Loveridge, and he limited his liability to the sum of 1122*l.* 2*s.* On the reference in the limitation proceedings, those who represented the *Caledonia* objected to any claim in respect of *The Marshalls*, on grounds which have been decided against them by the Registrar, namely in respect of the ownership of *The Marshalls*, and upon the question of whether the claimants were the demise charterers and whether the person interested was not really Mr. Loveridge.

But on behalf of the owners of the *Caledonia*, the objection was also taken that the claim was barred by s. 8 of the Maritime Conventions Act, 1911, and that objection the Registrar has found to be good. His report on that point is as follows: "In cases of limitation of liability, only those who have either commenced actions to recover damages or who are in a position to maintain actions at the time the decree for limitation is pronounced, are entitled to claim against the fund in Court. The claimants here were not in such a position, and it would have been necessary for them to obtain an extension of the time fixed by the statute before any such action could have been maintained. The claim therefore must be disallowed."

It is upon that ruling that the present motion is made on behalf of those parties who succeeded on the other grounds in respect of the claim for damage to *The Marshalls*. The material dates are as follows: The collision was on October 31, 1916. The two years therefore would expire on October 31, 1918. The decree in the damage action of the *Caledonia* against the *Disperser*, pronouncing the *Disperser* alone to blame, was on March 27, 1918. Messrs. Botterell & Roche were acting at that time as solicitors for the *Disperser*. They were also instructed in respect of the damage to *The Marshalls*. Messrs. Hearfield & Lambert were acting as solicitors for the *Caledonia*. On April 8, 1918, Messrs. Botterell & Roche, writing to Messrs. Hearfield & Lambert, said: "We have been instructed by the charterers of the lighter *The Marshalls* to act for them in connection with their claim for damages against the *Disperser*.

1920

THE DISPERSER.

Hill J.

We are informed that the amount paid by them in settlement is in the vicinity of 500*l.* As we understand your claim is in the neighbourhood of 1000*l.*, the total of the two claims will exceed the limit of the *Disperser's* liability, and in these circumstances it will be necessary for us to commence a limitation action." Messrs. Hearfield & Lambert, in reply, asked Messrs. Botterell & Roche for the names of their clients, the charterers of *The Marshalls*. Messrs. Botterell & Roche, being at the time misinformed, wrote stating that their clients were Messrs. W. H. Loveridge & Co., Ld., the charterers of *The Marshalls*. Messrs. Hearfield & Lambert on April 11, 1918, said: "In any limitation proceedings you commence our clients will oppose the claim you intimate that the charterers of the lighter *The Marshalls* have against the *Disperser*." There the matter rested for the time. The intimations up to this point were that the *Disperser* was bringing a limitation action; that in it the charterers of *The Marshalls* would claim, and that the owners of the *Caledonia* would oppose the claim.

It seems to me that at that time both parties contemplated that limitation proceedings would be taken. That involves that the claimants to the limitation fund would include the charterers of *The Marshalls*, and that their right to claim would be determined in the ordinary way in the reference following upon the limitation decree. At that time two years from the date of the collision had not expired. The claim put forward in respect of *The Marshalls* was in the name of Mr. Loveridge, but it subsequently turned out that several others were interested. Nothing happened until May 6, 1919, when the writ in the limitation action was issued. On July 14, 1919, the decree in that action was made. By that decree it was provided that all claims were to be brought in by October 14, 1919; it stayed all proceedings that were in existence, and referred all claims to the Registrar. The claim in respect of *The Marshalls* was filed on October 7, 1919, and was headed as a claim against the owners of the *Disperser* by five persons, who were named, including Mr. Loveridge. It turned out afterwards that Mr. Loveridge was interested in the *Disperser*,

1920

THE DISPERSER.

Hill J.

and his claim was disallowed. On March 22, 1920, the reference was heard, and the various points of objection by the *Caledonia* to the claim in respect of *The Marshalls* were taken. On March 25, 1920, the Registrar made his report.

It is now contended by Mr. Balloch that the limitation decree having been made directing all claims to be brought in, and *The Marshalls'* claim having been brought in within the time mentioned in the limitation decree, they were no further concerned with s. 8 of the Maritime Conventions Act, and, further, he submitted that if the Court thinks that the Maritime Conventions Act applies, then the time ought to be extended for commencing the proceedings under the discretion given by the proviso to s. 8. Mr. Langton, on the other hand, contends that the effect of the limitation decree is not to alter the parties' rights except that it limits the amount for which the wrongdoer is liable, and that the Court has still to see whether the right of *The Marshalls* is statute barred, and, if it is, he argues that there are no merits upon which the extension should be granted.

The case has been well argued on both sides. In the first place, it seems to me quite clear that in the reference which follows a limitation decree it is open to any claimant to dispute the right of any other claimant against the fund. The limiting owner in general ceases to have any interest in disputing anybody's claim because he is liable only for the amount he has paid in, and that being so, all rival claimants to the fund must be entitled to dispute one another's claims. It is further clear that a claimant cannot establish any right against the fund unless he can establish a good cause of action against the limiting owner: see *The Bellcairn* (1), where, cross-actions having been dismissed by consent and judgment entered accordingly, it was held that the respective parties were bound by the judgment, and had no longer got any legal rights, and, whatever the merits were, they could not at the reference assert that they had any right against the fund.

If each claimant against the fund must establish a legal

(1) (1885) 10 P. D. 161.

1920

THE DISPERSER.

Hill J.

right against the limiting owner, and if each claimant may raise against the other any defence which the limiting owner could raise, I find it impossible to distinguish a defence given by s. 8 of the Maritime Conventions Act from other defences, and it seems to me that it must be open to a rival claimant to contend that another claimant's action is barred by the effect of s. 8. Possibly difficulties may arise where the limitation decree is made before the expiration of the two years. But I have not to face that difficulty here. The limitation decree was made after the two years had expired. Whatever effect a limitation decree may have in preventing people from bringing an action, there was no limitation decree preventing the charterers of *The Marshalls* bringing an action within the two years. Mr. Balloch puts a case of great difficulty where, for instance, within one month of the expiration of the two years, the limitation decree is made ; and he asks, is anybody who has a claim which he intends to bring in a limitation action, to rush in and issue a writ for fear it should be said that he is statute barred ? But these difficulties are met by the consideration that the Court always has it in its power under s. 8 to extend the time. What would have happened if the point had arisen in respect of a claim under Lord Campbell's Act, I need not pause to consider. It would have been more difficult, because Lord Campbell's Act has not a proviso enabling the Court to exercise a discretion.

Notwithstanding the difficulties which Mr. Balloch has pointed out, I cannot see my way to saying that the effect of the limitation decree is to destroy the operation of s. 8 as an answer to a claim brought in in any limitation proceeding. But when the defence is raised by a rival claimant in limitation proceedings, two issues arise under s. 8. One is whether the two years have expired, and, secondly, if they have, is the case one in which the Court is bound, or ought in its discretion, to extend the time ? Those two issues must be determined in some way when raised on the reference. The Registrar is not the proper authority to deal with the question of extension of time, and that must come before the Court. In ordinary cases if this point had been raised, I think it would be

convenient for the Registrar to deal with all other matters, and then withhold the decree until an opportunity had been given to the claimant to apply to the Court for an extension of time, and upon that application the rival claimant could be heard in opposition.

In this case the Registrar has properly found, and it is not disputed, that the two years have expired. That, standing by itself, is an answer to the claim, and it is an answer which the rival claimant is entitled to set up ; but he cannot escape from having the other issue determined if the claimant wants it determined. Mr. Balloch applies to me to extend the time, and I have to consider whether the application should be granted. I must take the Registrar's report as I find it. He has found that the people to whom he has made an award were the demise charterers of *The Marshalls*, and that they have suffered damage. Mr. Langton says the claim has no merits in it. But I cannot go behind the report. I find that there are four people who have suffered damage, and who would undoubtedly be entitled to claim if they had issued their writ within two years. Ought they to have the time extended ? I am bound to pay attention to the correspondence which passed because it seems to me that in 1918 it was contemplated by everybody that the claim in question would be dealt with in the limitation proceedings. I think it is a proper case for exercising a discretion under s. 8 and for extending the time.

Further, I am of opinion that in most cases in which limitation proceedings are going on, they will be found to be proper cases for extending the time. I do not want what I have said to lead people to issue unnecessary writs. In general, where limitation decrees are made, I should think that a good reason for not issuing writs, and I hope therefore that when objections based on s. 8 are taken in limitation cases it will be borne in mind that in general the extension of time ought to be granted if the non-issuing of the writ has merely ensued from the contemplation of the parties that a limitation action would be begun and a limitation reference held.

The result is that in this case I hold that the time ought to

1920

THE DISPERSER.

HILL J.

be extended, and in the circumstances there will be no costs of this motion.

Solicitors for the charterers of *The Marshalls*: *Botterell & Roche.*

Solicitors for the owners of the *Caledonia*: *Holman, Fenwick & Willan.*

E. C. T.

1920

April 19, 26.

[ADMIRALTY.]

THE P.L.M. 8.

[1920, fol. 278.]

Admiralty—Collision—Limitation of Actions—Arrest of wrongdoing Vessel after Two Years—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

On September 15, 1916, a collision occurred between the steamship *P.H.* and the steamship *C.* In an action by the owners of the *P.H.* against the owners of the *C.* the latter pleaded that the fault was that of the *C.* and/or in the alternative, of the steamship *P.L.M.* 8, then called the *V.*; and in a separate action the owners of the *C.* sued the owners of the *V.* The two actions were tried in March, 1920, and the Court found in both actions that the fault was solely that of the *V.* Thereupon the owners of the *P.H.* issued a writ against the owners of the *P.L.M.* 8 (the *V.*) to recover the amount of the damage sustained in the collision with the *C.*

The owners of the *P.L.M.* 8 moved to set aside the writ on the ground that, more than two years having elapsed since the date of the collision, under s. 8 of the Maritime Conventions Act, 1911, the action was not maintainable.

Held, that, as the owners of the *P.H.* were aware that the owners of the *C.* blamed the *P.L.M.* 8, and there had been ample opportunity within the two years of arresting her and joining her as a defendant, the discretion vested in the Court under s. 8 to extend the time ought not to be exercised in the plaintiffs' favour; and the action declared not maintainable.

MOTION by the defendants to set aside a writ on the ground that the proceedings, not having been commenced within two years from the alleged cause of action, were not maintainable under s. 8 of the Maritime Conventions Act, 1911.

1920

THE P.L.M. 8.

The plaintiffs were the owners of the steamship *Port Hacking*; the defendants were the owners of the steamship *P.L.M.* 8, formerly the *Virginia*.

The plaintiffs' claim arose out of a collision which occurred between the *Port Hacking* and the steamship *Clermiston* on September 15, 1916. In respect of this collision an action was instituted on September 19, 1916, by the present plaintiffs against the owners of the *Clermiston*. By their defence and counterclaim in that action, dated December 8, 1916, the defendants, the owners of the *Clermiston*, denied liability and pleaded that the collision was caused solely by the negligent navigation of the *Port Hacking* or, alternatively, by the negligent navigation of the *Virginia*, or in the further alternative by the negligent navigation of both these vessels; and on January 30, 1918, the owners of the *Clermiston* instituted an action against the owners of the *Virginia*. The two actions were tried on March 3 and 5, 1920, when the *Virginia* was held alone to blame for the collision between the *Port Hacking* and the *Clermiston*. Accordingly, in the action by the *Port Hacking* against the *Clermiston* the claim and counterclaim were dismissed, and in the action by the *Clermiston* against the *Virginia* judgment was entered for the plaintiffs. Thereupon, on March 9, 1920, the owners of the *Port Hacking* issued the writ against the owners of the *Virginia*, now called the *P.L.M.* 8, which the defendants now sought to have set aside.

The defendants alleged that the *P.L.M.* 8, which at the time of the collision had been owned by The Gaston Williams and Wigmore Steamship Corporation of New York, had been sold in April, 1917, to the Société Nationale d'Affrétements; that she had come to United Kingdom ports some fifteen times before the period of two years elapsed; and that it would be doing an injustice to the persons really interested—namely, the underwriters—if the plaintiffs' claim was allowed to proceed.

The plaintiffs' case was that they knew nothing of the manœuvres of the *Virginia*, and that it was for the *Clermiston*, who blamed the *Virginia*, to get that vessel before the Court,

1920

THE P.L.M. 8.

and that the Court having found the *Virginia* solely to blame should exercise its discretion under s. 8 of the Maritime Conventions Act and allow the action to proceed notwithstanding that the period of two years had elapsed.

Noad for the plaintiffs. The plaintiffs were not bound to assume that the pleaded story of the *Clermiston* as to the movements of the *Virginia* was correct; beyond the fact that her green light had been seen the plaintiffs knew nothing about the navigation of the *Virginia*. When all the facts were investigated and the *Virginia* was before the Court she was held alone to blame for a collision in which the plaintiffs' vessel suffered damage, and it would be doing an injustice to the plaintiffs to allow the decision of the Court to be stultified by the mere fact that the *Virginia* was only before the Court in the one action and not in the other.

Langton for the defendants. The defence and counterclaim of the owners of the *Clermiston* in the action at the instance of the *Port Hacking* was delivered in December, 1916, and in that defence the contentions raised by the *Clermiston* against the *Virginia* were fully set out. The present plaintiffs, therefore, had nearly two years in which either to bring the owners of the *Virginia* into the action already commenced or to institute fresh proceedings. The only injustice to the plaintiffs would be if there had been no opportunity of arresting the *Virginia*, but she has come to this country on very many occasions and could have been arrested at any time. Further, there has been a change of ownership since the collision. The action is not maintainable unless the Court exercises its discretion, and under the circumstances the time should not be extended.

Cur. adv. vult.

April 26. HILL J. This is a motion for an order that the writ issued herein and the service thereof be set aside, and the conditional undertaking to appear and give bail be discharged, and the appearance entered under protest on behalf of the defendants be struck out on the ground that

1920

THE P.L.M. 8.

Hill J.

the proceedings herein are not maintainable by virtue of the Maritime Conventions Act, 1911, the same not having been commenced within two years of the alleged cause of action, the period provided for in the Act.

On September 15, 1916, a collision occurred between the steamship *Port Hacking* and the steamship *Clermiston*. The *Port Hacking* sued the *Clermiston*. The *Clermiston* pleaded that the fault was the fault of the *Port Hacking* and, secondly, that the fault was the fault of a third steamship, the *Virginia*, now the *P.L.M.* 8, and the *Clermiston* counterclaimed against the *Port Hacking*. The *Clermiston* also sued the *Virginia* in a separate action. The *Port Hacking* did not at that time bring any action against the *Virginia*.

The trial of the actions between the *Port Hacking* and the *Clermiston* and between the *Clermiston* and the *Virginia* took place on March 5, 1920. I found in both actions that the fault was solely that of the *Virginia*. Upon this the *Port Hacking*, which, as I have said, had so far not sued the *Virginia*, on March 9, 1920, issued a writ against the *Virginia* and the solicitors for the *Virginia* gave a conditional undertaking to put in an appearance and to give bail.

The *Virginia* now moves to set aside the writ and service and asks that the undertaking be discharged and the appearance set aside, on the ground that the action by the *Port Hacking* against the *Virginia* is barred by s. 8 of the Maritime Conventions Act, 1911. Upon that the *Port Hacking* asks the Court to extend the time under the proviso to s. 8.

It is clear upon the affidavits that have been filed that the second part of the proviso, the obligatory part of it, is not applicable. The *Virginia* at the date of the collision, September 15, 1916, was American-owned. She was, on April 27, 1917, transferred to French owners. Since then she has been many times within the jurisdiction—thrice in 1917 and many times in 1918 and 1919, and she was not under requisition, and therefore she could have been effectively arrested if a writ in rem had been issued against her.

The question therefore is: Ought the Court to exercise

1920

THE P.L.M. 8.

Hill J.

its discretion under the first part of the proviso to s. 8 ? It must be remembered that the Act gives the defendants a right, and it is a right that can only be taken away on sufficient grounds. What are the grounds which are alleged ? In an affidavit filed on behalf of the plaintiffs it is said : " By reason of the delay in getting the pleadings closed in the action by the owners of the *Clermiston* against the owners of the *Virginia*, to the delay in obtaining the evidence of witnesses who had been dispersed, and to the unusual length of time which elapsed (as in many other Admiralty actions arising out of collisions during the war) before the case could be conveniently fixed for trial, the plaintiffs in the present action were unable to institute proceedings against the defendants, the owners of the *Virginia*, within the two years of the date of the collision."

So far as the pleadings go, the important pleading from the point of view of the present matter is the defence of the *Clermiston*, which was delivered on December 8, 1916, and which, as I have said, alleged that the collision was caused by the fault of the *Virginia*, though also attributing fault to the *Port Hacking*. I have no specific information as to the delay in obtaining the evidence of the witnesses. When the witnesses for the *Port Hacking* were examined in the two earlier actions (the examination took place in January, 1920) they, in substance, put the blame on the *Virginia*.

I can see no reason why that information could not have been obtained (supposing it was not obtained) from the witnesses for the *Port Hacking* at a much earlier date than before the two years had expired. The delay in the trial of those actions was undoubtedly unfortunate for the present plaintiffs. If they had been tried within two years I dare say that the plaintiffs would have issued their writ against the *Virginia* within two years. But taking all these matters together, they do not seem to me to constitute a ground, or any sufficient ground, why the action should not have been brought within two years, or why I should exercise a discretion to deprive the defendants of a right which they have undoubtedly acquired by lapse of time. It is said that to let the *Virginia* off will work an injustice, because the blame

1920

THE P.L.M. 8.

Hill J.

has been found to rest with the *Virginia*. That is true enough in a sense, but it will equally work an injustice if I deprive the defendants of the legal right of limitation which they have got.

Therefore, I do not see any ground upon which I can deprive the present defendants of their right to say that the action is statute barred.

It is also said by the defendants that difficulties would arise because they were insured in a club and no provision has been made for this claim in the accounts of the club, and that it might be very difficult to get the club to pay at this late stage if the *Port Hacking* should obtain judgment. I am not so much impressed by that, though it is a matter to be taken into consideration. I think, however, that it is doubtful if the club has finally closed its accounts for the year 1916, and therefore I do not attribute very much weight to that objection.

The result is that I must refuse the application of the present plaintiffs for an extension of time. The Act says that "no action shall be maintainable." I do not think that that means that no writ may be issued, but that if the statutory limitation has expired the action shall not be maintainable. Therefore I think the proper order is not that the writ should be set aside, but that the action is not maintainable. That, in effect, is just as if a preliminary objection had been raised at the trial and decided against the plaintiffs, and the result is the same as if I had set aside the writ.

The motion of the defendants succeeds, with costs.

Solicitors for the plaintiffs: *W. A. Crump & Son.*

Solicitors for the defendants: *Holman, Fenwick & Willan.*

E. C. T.

P. D.
1920
Jan. 20, 26.

C. A.
Feb. 16, 17.

[IN THE COURT OF APPEAL.]

RUSH *v.* RUSH, BAILEY AND PIMENTA.

Divorce—Practice—Foreign Co-respondent—Difficulty of Service—Motion to proceed without citing Co-respondent—No Damages or Costs claimed by Petition—Discretion—Respondent's Right to be heard—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 27, 28, 33, 42.

The petitioner, a British subject domiciled in England, who charged his wife with adultery committed at Lisbon with two foreigners, applied by motion for leave to proceed without citing either of the co-respondents, on the grounds that they had both left Portugal; that neither he nor the respondent knew their addresses; and that he had wholly failed to trace them. The petition contained no claim for damages or costs against either of the co-respondents. The respondent had not been served with notice of the motion, but at her own request had received copies of the affidavits to be used at the hearing of the motion. At the hearing counsel for the petitioner objected to the respondent being heard. The President held that the respondent was entitled to be heard, and, on the facts, that the petitioner had not shown that the co-respondents could not be reached by one or other of the methods by which service or substituted service could be effected; and accordingly refused the motion. On appeal:—

Held (affirming the decision of the President), that ss. 27, 28, 33 of the Matrimonial Causes Act, 1857, showed that a foreign co-respondent domiciled abroad was not entitled as of right to claim to be dismissed from the suit, and that in the absence of special grounds the petition ought to be served upon him; but that the matter was one entirely within the discretion of the judge of the Probate and Divorce Division, and the Court of Appeal would not interfere with the exercise of that discretion unless it appeared that the judge had acted upon a wrong principle, or under some misapprehension, or without consideration.

Rayment v. *Rayment and Stuart* [1910] P. 271 approved.

Held, also, that although it was the usual practice for motions for leave to proceed without citing a co-respondent to be made ex parte, there was no rule of practice which prevented a respondent from being heard on such an application.

THE petitioner, a British subject domiciled in England, charged his wife with adultery committed at Lisbon, in Portugal, where the parties were then residing, with two foreigners, one being a citizen of the United States, and Secretary to the Embassy of that country in Lisbon, the other a Portuguese subject domiciled in Portugal. At the date of the petition the petitioner and the respondent had left Portugal and were residing in England.

This was a motion by the petitioner for leave to be excused from making the two alleged adulterers co-respondents, on the grounds that they had both left Portugal; that neither he nor the respondent knew their addresses, and that he had wholly failed to trace them. The petition contained no claim for damages or costs against either of the co-respondents. The respondent had not been served nor given any formal notice of the motion, but at her own request, and as a matter of courtesy, had received copies of the affidavits to be used at the hearing of the motion.

H. D. Grazebrook for the motion. The Court has no jurisdiction over the alleged adulterers, both of whom are foreigners; and the proper course is to excuse the petitioner from making them co-respondents: *Baker* v. *Baker and Dwyer*. (1) If they were cited as co-respondents they might appear and object to the jurisdiction, and the petitioner would be saddled with costs: *Levy* v. *Levy and De Romance*. (2) It would be proper to give them notice of the motion if they were to be found; but that would be both difficult and expensive: *Boger* v. *Boger*. (3)

[SIR HENRY DUKE P. referred to *Rayment* v. *Rayment and Stuart*. (4)]

In that case and *Chapman* v. *Chapman and Buist* (5) the co-respondents were domiciled in Scotland, and different considerations arise in the case of foreigners who are co-respondents.

T. Bucknill for the respondent.

H. D. Grazebrook objected to counsel being heard for the respondent, no notice of the motion having been served on her: *Dobson* v. *Dobson and Paxton*. (6)

T. Bucknill. *Jeffers* v. *Jeffers* (7) is an authority in favour of the respondent being heard.

Cur. adv. vult.

(1) [1908] P. 257.
(2) [1908] P. 256.
(3) [1908] P. 300.
(4) [1910] P. 271.
(5) [1910] P. 279.
(6) [1916] P. 110.
(7) (1877) 2 P. D. 90.

C.A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

Jan. 26. SIR HENRY DUKE P. This is the suit of a husband for dissolution of his marriage on the ground of adultery alleged to have been committed by the wife with two persons named in the petition. One of the alleged adulterers is said to be a citizen of the United States; the other a Portuguese citizen. The alleged acts of adultery are stated to have taken place in Lisbon when the petitioner and the respondent were resident there. Both the men in question are said to have left Lisbon, and the petitioner makes oath that he does not know, and is unable to ascertain, their whereabouts. On this ground the Court is moved on his behalf to dispense him from making these named persons co-respondents.

Upon the hearing of the petitioner's motion counsel for the respondent appeared to oppose it. His right to be heard was denied on behalf of the petitioner. The respondent has appeared in the suit, and was stated to intend to contest it.

As to the main question upon the motion, the Divorce Act of 1857 makes it obligatory in the case of a husband's petition that any alleged adulterer shall be made a co-respondent, subject to the proviso that the Court may upon special grounds dispense with the obligation. The Act also provides for service of co-respondents whether they are to be found within or without the King's dominions. Motion to this Court is the prescribed mode of obtaining the order which the petitioner seeks, and r. 115 of the Divorce Rules directs that when it is necessary to give notice of any motion, such notice shall be served within a prescribed time on the opposite parties who have entered an appearance.

The respondent's right to be heard was denied upon the authority of *Dobson* v. *Dobson and Paxton* (1), where counsel who appeared on behalf of a respondent and co-respondent to oppose a motion like the present was told he had no locus standi and no right to be heard. This refusal was said before me to result from a settled practice of the Court.

In *Dobson* v. *Dobson and Paxton* (1) the husband charged by his petition adultery with a named person. The respondent did not defend the suit, and the named person had not been

(1) [1916] P. 110.

served. The state of the case at the time of the motion explains to some extent the statement with which the interposition of the respondent and her alleged paramour was met by the learned judge. No general rule can be deduced from it.

In *Hook* v. *Hook* (1) Sir Cresswell Cresswell expressed a doubt whether the respondent had a right to be heard on such a motion; but in *Carryer* v. *Carryer and Watson* (2) the same learned judge heard a co-respondent in a similar case; and in *Jeffers* v. *Jeffers* (3) Sir James Hannen heard the respondent, and in deciding upon the motion took her submissions into consideration.

Having regard to these facts it cannot be said there has been an invariable practice. In point of principle what is required is that a party whose interests are affected by a motion shall have notice of it. The words as to opposite parties in r. 115 do not of course necessitate service of every motion upon all the opposing parties in the suit, or a motion as to maintenance or custody of children would need to be served on a co-respondent. Applying the test of interests affected I think it cannot be correctly said that a respondent who is charged with adultery with a named person in the petition to which she has appeared is not concerned in a motion which is intended to reconstitute the suit. The conduct of the cause on her behalf and her material interests in the ultimate event of the suit may both depend in some degree upon the part taken by a co-respondent. I hold therefore that the respondent was entitled to be heard in the present case.

The ground on which the petitioner seeks leave to proceed without making co-respondents is that he does not know and cannot ascertain their whereabouts. He does not state in his affidavit that he is unable to procure evidence against them. Each is fully identified; and although the petitioner does not know the present address of either, I cannot doubt that each could be reached by one or other of the methods

(1) (1858) 1 Sw. & Tr. 183. (2) (1865) 4 Sw. & Tr. 94.
(3) 2 P. D. 90.

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

The President.

by which service, or substituted service, can be made. The suggestion that a member of the American Diplomatic Service cannot be traced is very unconvincing. I think also that in common fairness notice should be given of the charge. Mr. Grazebrook's most cogent argument in support of the motion was founded upon the proposition that a co-respondent of alien nationality not resident within the jurisdiction would inevitably on his own application be dismissed from the suit. For reasons which are set forth in Sir Samual Evans' judgment in *Rayment* v. *Rayment and Stuart* (1) I do not accept this view ; and the general considerations as to the provisions of the Divorce Act, 1857, with regard to co-respondents, which were stated by the Lords Justices in *Saunders* v. *Saunders* (2), lead me to the conclusion that the present motion ought to be refused. J. R. B.

The petitioner appealed. The appeal was heard on February 16, 17, 1920.

H. D. Grazebrook for the appellant. Two questions arise on this appeal. The first is whether the wife has a right of audience on a motion by the petitioner for leave to proceed without citing either of the co-respondents. The second is whether the petitioner can be excused from citing the co-respondents against whom he can get no relief.

Upon the first point it is submitted that the respondent wife is not entitled to be heard on the petitioner's application : *Dobson* v. *Dobson and Paxton.* (3) In that case it was held that the respondent had no locus standi, and that notwithstanding the fact that notice of motion had been served on her solicitors, she could not be heard in opposition to the application. See also *Carryer* v. *Carryer and Watson.* (4) *Jeffers* v. *Jeffers* (5), which was relied upon by the other side, is not an authority in the respondent's favour. In that case it was held that an application to dispense with making a co-respondent should be made at an early stage of the

(1) [1910] P. 271.
(2) [1897] P. 89.
(3) [1916] P. 110.
(4) 4 Sw. & Tr. 94, 95.
(5) 2 P. D. 90.

suit; but, except under special circumstances, it would not be allowed after the respondent had filed her answer to the petition. All that was there decided was that there was no special ground alleged by the respondent why the application should be refused.

[WARRINGTON L.J. The respondent was however heard.]

The practice in the Divorce Division is to make these applications ex parte. There is not a single reported case from *Jeffers* v. *Jeffers* (1) down to *Dobson* v. *Dobson and Paxton* (2) in which a respondent or co-respondent has been heard.

Upon the second point, it is submitted, that having regard to the fact that both the co-respondents are resident and domiciled abroad, and that they are not (unless they consent) subject to the jurisdiction of the Court, the proper practice is for the Court to give leave to the petitioner to proceed without citing them: *Gaynor* v. *Gaynor and Degliantoni* (3); *Levy* v. *Levy and De Romance* (4); *Baker* v. *Baker and Dwyer* (5); *Boger* v. *Boger* (6); *Grange* v. *Grange and Arendt.* (7)

[LORD STERNDALE M.R. referred to the practice as stated in Rayden on Divorce, p. 110, § 31.]

If the petitioner has to cite the co-respondents they may appear and object to the jurisdiction and obtain an order as of course dismissing them from the suit, and the petitioner would be compelled to pay their costs.

[WARRINGTON L.J. Your point is that it is perfectly futile to cite a man who may immediately apply to be dismissed from the suit.]

That is so. The petitioner is here making no claim against either of the co-respondents for damages or costs.

The present case is distinguishable from *Rayment* v. *Rayment and Stuart* and *Chapman* v. *Chapman and Buist.* (8) In the first case the Court was dealing with a British subject, a

(1) 2 P. D. 90.
(2) P. 110.
(3) (1862) 31 L. J. (P. & M.) 116.
(4) [1908] P. 256.
(5) [1908] P. 257.
(6) [1908] P. 300.
(7) [1892] P. 245.
(8) [1910] P. 271, 279.

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

Scotsman, and not a foreigner, and in the second the petitioner was asking for damages and costs against the co-respondent. In both cases the petitioners were asking for relief against the co-respondents: costs in the first case and damages and costs in the second case. Here neither damages nor costs are asked for.

[YOUNGER L.J. What injustice would be done by dismissing the co-respondents from the suit?]

None whatever. If the Court is of opinion that they ought to have informal notice, that will be given.

In *Saunders* v. *Saunders* (1) it was held that the discretion given to the judge under s. 28 of the Matrimonial Causes Act, 1857, to allow a petition for divorce to proceed, on special grounds, without making any co-respondent, is to be exercised with regard to the principles laid down in or to be gathered from the Act and the Rules, and the circumstances of the particular case, and cannot be fettered by any rule of practice.

In that case Lord Gorell based his decision on *Jones* v. *Jones* (2), which was not a case like the present. The majority of the Court of Appeal allowed the husband to proceed with the petition without naming any co-respondent.

[LORD STERNDALE M.R. That was not the same case as this.]

The foundation of the matter is summarized in a passage in the judgment of Sir Samuel Evans in *Rayment* v. *Rayment and Stuart* (3), which is based on Dicey's Conflict of Laws, 2nd ed., pp. 40–58.

The petitioner has taken the right course in applying to the Court at an early stage, and the order ought to be made. There is no suggestion of collusion.

[He also referred to *Deck* v. *Deck* (4); Matrimonial Causes Act, 1857, s. 42; Divorce Rules, rr. 4–18.]

T. Bucknill for the respondent.

[LORD STERNDALE M.R. We will hear you as amicus curiæ.]

(1) [1897] P. 89.
(2) [1896] P. 165, 170.
(3) [1910] P. 271, 290.
(4) (1860) 2 Sw. & Tr. 90.

The present case is one of great importance on divorce practice, and it is essential that both parties should be represented. Unless this Court holds that there is no power in the Divorce Court to order a foreign co-respondent out of the jurisdiction to be served this is a case in which in the interests of justice the co-respondents ought to be ordered to be served.

[LORD STERNDALE M.R. Does it not come to this whether the decision in *Rayment* v. *Rayment and Stuart* (1) or the statement of the law in Rayden on Divorce at p. 110, § 31, is correct ?]

That is so. The procedure under the Matrimonial Causes Act, 1857, flows from the Common Law Procedure Act, 1852. It is necessary to consider what the old Ecclesiastical Courts would have done under the present circumstances. There were originally two forms of action—suits for divorce a mensa et thoro in the old Ecclesiastical Courts, and an action in tort for criminal conversation. This explains the provisions of the Matrimonial Causes Act, 1857. The matter is dealt with in Shelford on Marriage and Divorce, published in 1841, before the Act was passed ; see pp. 386, 486. In a suit for divorce a mensa et thoro the Ecclesiastical Courts had no power to cite persons resident outside the jurisdiction. This fact was of course known to the framers of the Act of 1857. That Act created a new practice. By s. 27 it enables a husband or wife to present a petition for dissolution of marriage on any of the grounds therein stated. By s. 28 upon any such petition presented by a husband the petitioner is to make the alleged adulterer a co-respondent to the petition, unless on special grounds to be allowed by the Court he is excused from so doing. Sect. 33 enables the husband to claim damages against the adulterer subject to the like rules and regulations as then obtained in actions for criminal conversation. Sect. 34 empowers the Court to order the adulterer to pay costs. Sect. 42 provides : " Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall

(1) [1910] P. 271.

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

by any general or special order from time to time direct. . . . . Provided always that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do." The latter section does away with the suggestion that the Court has no jurisdiction over a foreign co-respondent resident abroad. Down to the time of the Common Law Procedure Act, 1852, there was no provision for the service of a writ out of the jurisdiction. That defect was remedied by s. 18 of that Act, but that section, like Order XI., r. 1 (*e*), expressly excepted Scotland and Ireland from its provisions: *Lenders* v. *Anderson*. (1) The Court has therefore power to order service out of the jurisdiction, and it submitted that the fact that a co-respondent is a foreigner does not bring the case within the proviso to s. 42.

The case law on the subject since 1857 is in a very unsatisfactory state. In *Tomkin* v. *Tomkin* (2) the petitioner had already obtained a sentence of divorce a mensa et thoro in the Ecclesiastical Court and recovered damages in an undefended action for crim. con. against the alleged adulterer, and the Court allowed him to proceed without making him a co-respondent.

Carryer v. *Carryer and Watson* (3) is the first case in which the question of jurisdiction arose, and it was there held that the petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent. By r. 22 of the Divorce Rules: "If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction." It was under that rule that *Gaynor* v. *Gaynor and Degliantoni* (4) was decided. The co-respondent had there appeared under protest but no question of principle was there discussed. In *Wilson* v.

(1) (1883) 12 Q. B. D. 50, 56.
(2) (1858) 1 Sw. & Tr. 182.
(3) 4 Sw. & Tr. 94.
(4) 31 L. J. (P. & M.) 116.

Wilson and Howell (1) again the co-respondent took advantage of r. 22 and appeared under protest, and filed an act on petition, in which he alleged that the Court has no jurisdiction to entertain the suit. The petitioner filed an answer, and subsequently applied to withdraw it and that the co-respondent should be dismissed from the suit, and the Court granted the application notwithstanding the opposition of the co-respondent. That is the only reported instance of a co-respondent being dismissed from a suit although he objected. Then there is a gap of twenty years between that case and *Grange* v. *Grange and Arendt.* (2) In that case the respondent was not present, and the petitioner raised no objection to the co-respondent being dismissed from the suit. The case is of no binding authority, as the Court did not there deal with the question of jurisdiction.

In *Machado* v. *Fontes* (3) it was held that an action would lie in respect of an act committed outside the jurisdiction if the act was wrongful both in this country and in the country in which it was committed. *Saunders* v. *Saunders* (4) was merely a case of the exercise by the Court of its discretion under s. 28. In *Wray* v. *Wray and D'Almeida* (5) the only question was how the co-respondent was to be served.

[WARRINGTON L.J. That assumes that he ought to be served.]

In *Levy* v. *Levy and De Romance* (6) it appears to have been assumed that the Court had no jurisdiction over a foreign co-respondent domiciled abroad. And a similar remark applies to *Baker* v. *Baker and Dwyer.* (7)

The question of jurisdiction was never seriously raised till *Rayment* v. *Rayment and Stuart.* (8)

[WARRINGTON L.J. What is the first trace of the Court dispensing with service on a co-respondent on the ground that he could come and ask the Court as a matter of right to be dismissed from the suit?]

(1) (1872) L. R. 2 P. & M. 353.
(2) [1892] P. 245.
(3) [1897] 2 Q. B. 231.
(4) [1897] P. 89.
(5) [1901] P. 132.
(6) [1908] P. 256.
(7) [1908] P. 257.
(8) [1910] P. 271.

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

That first appears in *Boger* v. *Boger*. (1) There were two other cases in 1909 in which the question of jurisdiction arose: *Fairfax* v. *Fairfax and De la Cruz* (2) and *Walter* v. *Walter and Bergmann*. (3) In neither case was the respondent before the Court to argue the point, and in the second the petitioner consented to the respondent being dismissed from the suit. In *I'Anson* v. *I'Anson and Oldbury* (4), where the alleged domicil of the co-respondent was in New Zealand, Sir Samuel Evans, in *Rayment* v. *Rayment and Stuart* (5), stated that the President (Sir Gorell Barnes) doubted how far domicil should determine cases like the above. That shows that after *Fairfax* v. *Fairfax and De la Cruz* (2) there was still some judicial doubt on the point.

[LORD STERNDALE M.R. I do not know what that doubt was. The drift of the decisions up to *Rayment* v. *Rayment and Stuart* (5) justifies the statement in Rayden on Divorce, p. 110, § 31.]

In *Statham* v. *Statham and Gaekwar of Baroda* (6) the only question was whether a foreign ruling prince could be made a co-respondent to a petition for divorce in this country, and it was held that by international law he could not, and that his name must be struck out as co-respondent. That statement of the law is no doubt accurate.

If therefore there is any such practice as has been contended for on behalf of the petitioner, it is, it is submitted, wrong.

Then as to the right of the respondent to be present on an application of this kind, the proper practice in the majority of cases is no doubt for the petitioner to make the application to dispense ex parte, but there are cases in which it is right and proper that the wife should be present and have an opportunity of being heard on the application.

[YOUNGER L.J. I cannot see any prima facie reason why she should not always be entitled to be present.]

The question is one of expense. There ought to be a right

(1) [1908] P. 300.
(2) (1909) 25 Times L. R. 213.
(3) Ibid. 473.
(4) Unreported. Sir Gorell Barnes, President, Jan. 11, 1909.
(5) [1910] P. 271, 283.
(6) [1912] P. 92.

of audience, in a proper case, in the wife. If the Court knows that she has that right it can protect itself.

[YOUNGER L.J. If it is a matter of discretion why should it not be exercised in the wife's favour in this case ?]

There is every reason why it should be. She is here denying the charge against her with both co-respondents.

It is essential that both parties should be separately represented. The co-respondents are not compellable witnesses, and it is to her advantage that she should have an opportunity of coming to the Court independently and contesting the matter.

H. D. Grazebrook in reply referred to *Phillips* v. *Batho*. (1)

LORD STERNDALE M.R. This is an appeal from a decision of the President of the Divorce Division on a motion to dispense with citing the two co-respondents named in the petition, on the ground that they were foreigners resident abroad, and also on the ground that it was not known where they were. With regard to one of them the last ground cannot be maintained. It is known quite well where he is. With regard to the other, a Portuguese gentleman, there may be rather more difficulty at the moment in obtaining his address, but I do not believe there is any real difficulty in finding out where he is.

The real point that was argued before us was this : it was contended on behalf of the petitioner that a foreigner resident abroad is not subject to the jurisdiction of the Court, and that if served with a citation he is entitled as of right to come to the Court and ask to be dismissed from the suit ; and to be paid his costs ; that in those circumstances the Court will not go through the farce and perhaps inflict the injustice on the petitioner of obliging him to serve the citation upon a person who can come at once and say, "I claim to be dismissed with costs," and that the Court will not therefore in a case like the present, where no relief is asked against either of the co-respondents, expose the petitioner to that unnecessary trouble and expense. The case may possibly

(1) [1913] 3 K. B. 25, 28.

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

Lord Sterndale M.R.

be different, although I do not think it is, where costs only are claimed, but it certainly is where damages are claimed.

The late President, Sir Samuel Evans, decided in a very careful and elaborate judgment in *Rayment* v. *Rayment and Stuart* (1) that a foreign co-respondent resident abroad is not entitled to demand, as of right, to be dismissed from the suit, and one of the questions we have to decide is whether or not we agree with that decision. If we do agree with it one of the main grounds upon which the appellant here rests his case is gone. I do not think it is necessary to go through the whole of the judgment in *Rayment* v. *Rayment and Stuart.* (1) It is I think fair to say that up to the decision of that case the law was to be inferred not so much from express decisions as from decisions which seem to imply the fact to be, as stated in Rayden on Divorce, p. 110, that "a co-respondent resident and domiciled abroad is not (unless he consents) subject to the jurisdiction of the Court." We have been referred by both learned counsel to the cases preceding *Rayment* v. *Rayment and Stuart* (1), and I think that position may be said to arise from them even if the law is not expressly so declared. In my opinion Sir Samuel Evans was right in saying that that was not a correct statement of the law.

The question turns in a great measure upon two or three sections of the Matrimonial Causes Act, 1857. Sect. 27 provides that a husband may present a petition for dissolution of marriage under the circumstances therein mentioned. Sect. 28 says: "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing." Sect. 33 provides: "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner; and such petition shall be served on the alleged adulterer and the wife, unless the Court shall

(1) [1910] P. 271.

dispense with such service, or direct some other service to be substituted. . . . ." Of those sections ss. 27 and 28 seem to be substituted for the old decree of divorce a mensa et thoro, and s. 33 seems to be substituted for the old action of criminal conversation. Sect. 33 we may put on one side, because no damages are claimed by the present petition. Sect. 42 provides that " Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall by any general or special order from time to time direct; and for that purpose the Court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do." Therefore any person—not only a British subject—may be made a co-respondent to a petition, and having been made a co-respondent the petition can be served upon him either within or without His Majesty's dominions. I agree with Sir Samuel Evans that the result of that is that the Court by statute assumes jurisdiction over those persons, and can give effective judgment in respect of them, although as they may be foreigners without any assets in this country to pay either damages or costs, it may be that if there be a judgment for damages or costs it cannot be satisfied. If that be the right view a co-respondent is not entitled to come to the Court as a matter of right and say, " I must be dismissed from this suit because I am a foreigner." This is a suit for divorce, but no damages are claimed, and therefore s. 33 does not apply; it is a suit for divorce under s. 27, and the petition in that suit can be filed against any person and served in any country. It seems to me that that is quite sufficient to show that the Court by statute has assumed jurisdiction over that person. This opinion is very much more fully elaborated by Sir Samuel Evans in *Rayment* v. *Rayment and Stuart* (1), and as I agree with his reasoning I do not think it necessary to repeat it. Part of the reasoning in that case, which deals with the analogy of a petition under

(1) [1910] P. 271.

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

Lord Sterndale M.R.

s. 33 to an action of criminal conversation, does not apply to this case, and I therefore say nothing about it.

It seems to me that the position is this. The ground that seems to have been acted upon in dispensing practically as of course with foreign co-respondents—namely, that they can ask as of right to be dismissed from the suit—is gone. The Court when it dispensed with service on the co-respondent often provided that notice should be given to him, because it was considered only fair, whether pecuniary claims were made upon him or not, that he should have notice of charges that were made against his character. The reason why informal notice of that kind was directed to be given to him was because although it was thought fair that he should have notice, it was at the same time not thought fair to oblige the petitioner to serve the petition upon him and to cite him to come when the result would be to put the petitioner to unnecessary costs. If the proper position be that he is not entitled to be so dismissed as of right, there is no reason why the ordinary way of giving him notice—namely, by citing him and serving the petition on him—should not be followed. In my opinion the learned President was right in saying that in the absence of sufficient ground upon which he would be inclined to dispense with such service the petition should be served as the Act requires. In saying this I do not in the least mean to say anything that may fetter the discretion of the judge in the Divorce Division to dispense with service upon a co-respondent if he, in his discretion, thinks fit to do so. There may be cases in which it is obviously unnecessary that such service should be dispensed with; on the other hand there may be cases in which it should be dispensed with, as, for example, where owing to ignorance or the lack of means of information it is impossible to ascertain where he is. There may be other reasons, and in any cases in which there are such reasons the judge has full power to exercise his discretion by dispensing with the service. In this case the learned President did not think fit to exercise his discretion in that way. We do not interfere with a learned judge's discretion unless he appears to have acted on a wrong

principle or under some misapprehension or without consideration. I do not think it is necessary to consider whether in the present case we should have exercised the discretion in the same way. I am of opinion that we cannot interfere with it as exercised by the learned President.

That leaves only one point—an important point—and it is this. On the hearing of the motion before the President the respondent, who had not been served with the notice of motion, but had been informed that it would be made, appeared, and the point was taken on behalf of the petitioner that she had no right to appear, and several cases were cited in support of that contention. The same cases were cited and the same contention was maintained before us, and we were told, and this was agreed to by both learned counsel, that it was the ordinary practice in the Divorce Division for these motions to dispense with service of a petition on the co-respondent to be made ex parte. We have no wish in any way to interfere with that practice, which seems to us to be a very convenient one. There are a great many cases in which nobody except the petitioner is concerned in the matter, and I think it is quite right that such motions should be made ex parte in the first instance. I do not however think there is any rule either of law or of practice which lays down that the respondent cannot be heard if the judge, in his discretion, thinks fit to hear her. In my opinion he has full power to do so, and I cannot see any reason why such power should be withheld from him. It may be of no importance to the respondent; it may on the other hand be of very great importance to her. It seems to me that the learned judge in dealing with an ex parte motion may very well say, "It is quite right to make these applications ex parte in the first instance, but this is a case in which I see that it is proper that the respondent should be heard, and I wish to hear her." He has I think a perfect right to say so. Therefore I think the learned President was right in hearing the respondent, because in his discretion he thought it proper to do so. In the same way I think the respondent was entitled to be heard here. If the learned President thought it right

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

to hear her in the Court below it is quite right that she should be heard in support of his decision in the Court of Appeal. I think therefore that this appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The appeal is from an order of the learned President refusing to dispense with the citation of certain foreign co-respondents resident abroad. The main contention on behalf of the petitioner was that it had been the practice of the Court to dispense with the service of a foreign co-respondent resident abroad because, as it was then assumed, such co-respondent was entitled as of right, provided he had entered an appearance, to come here and demand to be dismissed from the suit. It was thought under those circumstances to be a useless expense for the petitioner to serve the citation upon him. But the foundation for that practice has been removed by the judgment of Sir Samuel Evans in *Rayment* v. *Rayment and Stuart*. (1) If that judgment is correct then it is no longer true to say that a foreign co-respondent having been served and having entered an appearance under protest can come as a matter of right and ask to be dismissed from the suit.

I have carefully read the judgment of the learned President in *Rayment* v. *Rayment and Stuart* (2); the arguments he uses commend themselves to my mind, and I think that the conclusion at which he arrived is a correct one. He sums it up in the following passage: "I think that as the Act gives power to serve anybody as co-respondent anywhere, it gives jurisdiction to make an order against him, and to issue process of execution to enforce the order in this country, which can be done without in any way affecting any international comity or offending any international susceptibilities." Then he quotes a passage from the judgment of Lindley M.R. in *Pemberton* v. *Hughes* (3), which is itself a quotation from Piggott on Foreign Judgments, 2nd ed., p. 130, in these terms: "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal

(1) [1910] P. 271. (2) [1910] P. 271, 291.
(3) [1899] 1 Ch. 781, 792.

to defend the suit." That is, in other words, it is a question of the municipal law of the country in which the suit is pending. With that conclusion I agree. It comes to this then, that the petitioner can no longer say it is useless to serve the foreign co-respondent because he can come and demand to be dismissed as of right. It remains therefore purely a matter of discretion, and nothing that I say in this judgment must in any way be taken to fetter the discretion of the learned judge in the Divorce Division in such a matter. All I say is that that particular reason for dispensing with service is out of the way. In this case the learned President has in the exercise of his discretion refused to dispense with service on the co-respondents, and I see no ground for interfering with that exercise of it. The appeal must therefore be dismissed.

On the other point I also desire to say this, that I have not the least intention of interfering with the practice of making these motions ex parte, but I think it is wrong to say that the respondent has no locus standi to be heard on them. As a party to the suit I think it is clear she has a locus standi upon any application on which it is proper she should be heard. In an application of this kind which may affect her interests I think if the Court sees that they would be so affected, or even if having received informal notice she informs the Court that they would be affected, that the Court is entitled, and in a proper case ought, to hear what she has to say. So also in my opinion it was quite right for this Court to hear what the respondent had to say on the present appeal. I think the appeal fails and must be dismissed.

YOUNGER L.J. I am entirely of the same opinion, and I do not desire to add anything to what my Lord and the Lord Justice have said on the first point which has been argued before us. With regard to the second point I only wish to say this, that I think there can be no doubt, after what counsel have told us, that the practice which prevails in the Probate and Divorce Division of dealing with these applications in the first instance ex parte and in the absence of the respondent is a convenient practice and one which

C. A. 1920

RUSH v. RUSH, BAILEY AND PIMENTA.

Younger L.J.

ought not to be disturbed. On the other hand I think it is also plain that sometimes such an order as is asked for on this application may vitally concern the position of the wife in the suit, and it would in my opinion be unfortunate if, by reason of the settled practice of making these applications in the first instance ex parte, the Court should ever come to the conclusion that it may dispense itself of the duty of seeing that no injustice is done to a respondent in her absence by any order made on such an application. I think that it is and always will be the duty of the Court to see that no injustice is likely to be done, and if it does in any case see that any such injustice is likely, I apprehend that it would be its duty to refuse to entertain the application until the respondent has been served and has had an opportunity of being heard, or if the respondent is present, as she is in this case, until the Court has heard what she has to say.

Appeal dismissed.

Solicitors for appellant: *Jaques & Co., for Pennington & Higson, Liverpool.*

Solicitors for respondent: *Cunliffe, Blake & Mossman, for Harold Pemberton, Liverpool.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1920
Feb. 24, 25;
March 22.

GODMAN *v.* GODMAN.

Will—Probate—Soldier's Will—Testamentary Intention—Codicil—Letter containing Instructions to alter Will—Interdependent's disposition of Real as well as Personal Estate—Wills (Soldiers and Sailors) Act, 1918 (7 & 8 *Geo.* 5, *c.* 58), *s.* 3.

A testator in 1915 executed a will and codicil prepared by his solicitor in the ordinary manner in England. Shortly afterwards he joined the Army and went abroad, where he was wounded and taken prisoner by the Germans. In July, 1917, while in captivity, he wrote a letter to his wife dealing with family matters of business and saying: "Tell M. (his solicitor) this affects my will, which I want added to it at once." Then followed directions as to the disposition of his real and personal estate. He died, while still a prisoner, in October, 1917, before any alterations had been made in his will. Probate was granted by the Registrar in common form of the will and codicil of 1915, with the letter as a second codicil. In an action by the executors of the will and first codicil, to revoke the probate of the second codicil and establish the will and first codicil only:—

Held, that the testator having died before the Wills (Soldiers and Sailors) Act, 1918, came into operation, the letter could only operate on the personal estate, and inasmuch as it dealt with real as well as personal estate, the gifts of the personal estate not being independent of those of the realty, the letter was improperly admitted to probate.

Decision of Horridge J. [1919] P. 229 affirmed by Lord Sterndale M.R. and Warrington L.J., Scrutton L.J. dissenting.

Appeal from a decision of Horridge J. (1)

The action was brought by the executors of the will and one codicil of Captain Frederick Tyrell Godman who died a prisoner of war in Germany on October 12, 1917. The testator was a managing director of Whitbread & Co., Ld., and lived in a house called Little Ote, Wivelsfield, Sussex. By his will dated August 12, 1914, he gave his wife a legacy of 200*l.* and all his household furniture and effects, including live and dead farming stock, absolutely. He gave his jewellery to trustees in trust for his wife during her life, and after her death for his sons in equal shares. He gave his wife during widowhood an annuity of 500*l.*, to be reduced to 250*l.* on second marriage, and the house he resided in. Subject

(1) [1919] P. 229.

C. A. 1920

GODMAN v. GODMAN.

thereto he gave the house to the eldest of his sons then living who should attain twenty-one. And he gave the residue of his estate to trustees in trust for sale and conversion and to hold the proceeds in trust for all his children living at his death in equal shares. He appointed his wife, two brothers and his solicitor (a Mr. Mattingly) to be his executors. He made a first codicil to his will not affecting the matters in question in this case.

At the beginning of the war he obtained a commission in the Army and proceeded to France where he was wounded and taken prisoner by the Germans.

At the date of his will he had one child only, a son, Richard, who survived him but died on July 15, 1918. A second son, Thomas, born during his captivity in Germany, also survived him.

On July 8, 1917, he wrote a letter from his prison camp to his wife in very affectionate terms stating among other things that he had increased her allowance, and containing the following passage: "Also tell Mattingly this affects my will, which I now want it added to at once, that as Whitbreads have given the shareholders more leaving powers I wish Dick and Tommy to have my ordinary shares equally divided between them; also that Bankside and grounds are to be in case of my death yours for life and then Tommy's plus Bankside farm, the remainder of my property to be Dick's, otherwise the will holds good. You will please show him what I have written."

Mr. Mattingly had acted as the testator's solicitor for many years and had prepared his will. Between the date of the will and the writing of the above letter the testator had acquired certain additional real estate including the Bankside property mentioned in the letter; and during the same period Whitbread & Co., in which company he held a number of shares, had altered their articles of association thereby enabling any ordinary shareholder to leave the whole instead of only half of his shares to his family.

The testator died in the German prison camp on October 12, 1917, before any alteration could be made in his will.

On January 15, 1918, probate of the will and first codicil and of the letter of July 8, 1917, as a second codicil, was granted out of the principal registry to his wife and one brother, R. T. Godman, Mattingly having renounced probate, and power being reserved for the other brother to prove, which he afterwards did.

An originating summons was then taken out in the Chancery Division to determine the construction of the will and second codicil; but Peterson J. expressed a doubt whether the letter had been properly admitted to probate, and directed that the summons should stand over generally with a view to having this question determined in the Probate Division.

This action was then brought by the testator's brothers, as executors, against the widow and surviving son asking that probate should be revoked and the letter pronounced against.

Horridge J. refused probate of the letter, not on the ground that it was not a good codicil, but on the ground that it could not operate upon realty, and that the realty and personalty were so indivisibly connected in the letter that it was impossible to give effect to the letter as regarded the bequest of personalty or even as regarded the bequest of the shares. He therefore pronounced in favour of the will and first codicil, but against the letter.

The widow appealed.

Tomlin K.C. and *Hon. S. O. Collins* for the widow of the testator. It is submitted that the revocation of probate of the second codicil was wrong and that probate of it ought to go with the original will and codicil. Horridge J. held that it was a true soldier's will but that it ought not to be admitted to probate because it dealt with real estate. It is the duty of the Probate Court when satisfied that a document is a soldier's will to admit it to probate. It is no part of its duty to take upon itself the functions of a Court of construction. It is for the Chancery Court to determine the meaning and effect of the will.

It is the practice of the Probate Court to admit to probate

C. A. 1920

GODMAN v. GODMAN.

wills which are valid as to personalty but invalid as to realty.

The title of a document to probate does not depend on construction but on its being the final declaration of testamentary intention.

Before the Wills Act, wills of real and personal estate were in entirely different positions. No formalities were required in regard to dispositions of personal estate. The position of soldiers with regard to personal estate was not altered by s. 11 of the Wills Act, and therefore the Court has to apply the law as to formalities as it existed before the Act.

If the judgment of Horridge J. in this case is correct the Probate Court will have to investigate all the testamentary dispositions of a testator before admitting his will to probate.

Tudor v. *Tudor* (1) which is reported in a note to *Gillow and Orrell* v. *Bourne* (2) was relied on by Horridge J. That case shows that the presence of dispositions of realty and personalty in a will is not fatal.

The true meaning of it is that in determining whether there is a final declaration of testamentary intention it may be necessary, where the dispositions of the real and personal estate are so inextricably mixed up that it would be impossible to give effect to the one without the other, for the Court to say that it is not the final declaration of the testator's testamentary intention. The mixing up of the real and personal estate is one of the many elements which may be taken into account in considering whether the will represents the final testamentary intention of the testator.

The only function of the Probate Court is to satisfy itself that the will represents the final expression of the testator's testamentary intention.

At law no formalities as regards personalty were required, but they were required in the case of realty.

In *Jekyll* v. *Jekyll* (3) Sir George Lee dealt with the question.

Horridge J. has misapprehended the true effect of these cases.

(1) (1831) 4 Hagg. Ecc. 199n. (2) (1831) 4 Hagg. Ecc. 192.
(3) (1753) 1 Lee, 419, 429.

A will sufficient to pass personal estate will not amount to a revocation of a former will whereby the real estate is devised according to the Statute of Frauds: *Limbery* v. *Mason* (1), "So in a case where the testator gave instructions to make his will of his real and personal estate, and when it was brought to him he made several alterations, and then wrote the whole over as altered in his own hand; this found in his study, though not signed or sealed, was holden a good will." See also *Hyde* v. *Hyde*. (2)

If ever there was a case in which real and personal estate were intermingled it was that case. Therefore intermingling cannot be a ground for refusing probate. There was a curious combination there of real and personal estate in the two documents, but that was not regarded by the Ecclesiastical Court as a ground for refusing probate.

In the present case there is no interdependency between the real and personal estate. There is nothing here to connect the gifts of the shares with the gifts of the real estate. It is submitted that "the remainder of my property" here means "the remainder of my real estate." Our submission is that the judge having arrived at the conclusion that the testator had expressed a final testamentary intention it was not open to him to refuse probate on the grounds stated by him. There was no such right; and if there is any case which decides that there is, it is submitted it is wrong.

Before the Wills Act there was no distinction for this purpose between the will of a soldier and that of any other person as regards personalty. All the cases like *Tudor* v. *Tudor* (3) have been cases where the Probate Court has been unable to come to the conclusion that the testator has expressed a final testamentary intention.

[*Priestley K.C.* referred to *Douglas* v. *Smith and Brown*. (4)]

That case is precisely on the lines we have been suggesting. The testator there had converted his real and personal estate into a mixed fund for a specific purpose.

(1) (1735) Comyns, 451, 453.
(2) (1707) 3 Ch. Rep. 155; 1 Eq. Cas. Abr. 409 (3).
(3) 4 Hagg. Ecc. 199n.
(4) (1833) 3 Knapp, 1.

C. A. 1920

GODMAN v. GODMAN.

[SCRUTTON L.J. referred to *Elsden* v. *Elsden*. (1)]

The mere fact that a testator contemplates the execution of a formal will does not prevent his expression of intention being the expression of his final testamentary intention.

Gattward v. *Knee* (2) is a good illustration of this. It was there held that a letter was an expression of a final testamentary intention although the testator contemplated embodying it in a formal document.

For the reasons indicated it is submitted that the last part of Horridge J.'s judgment is based on a misapprehension of the functions of the Probate Court and a misreading of *Tudor* v. *Tudor*. (3) If there is once a final expression of testamentary intention the Court cannot refuse probate.

[*In the Goods of Herne* (4), *Huntington* v. *Huntington* (5), *Cary* v. *Askew* (6) and *Bradford* v. *Young* (7) were also referred to.]

Priestley K.C. and *W. O. Willis* for the respondents. The executors desire to assist the Court in every way. Before the Statute of Frauds (29 Car. 2, c. 3) wills were not required to be in writing, but that Act, by s. 5, required wills disposing of real estate to be in writing and attested by three witnesses. By s. 23 soldiers on active service were given the privilege of disposing of personalty as they might have done before the Act. [They referred to *Lemann* v. *Bonsall* (8), *Bennett* v. *Jackson* (9) and *Morrell* v. *Morrell*. (10)]

The Wills Act, 1837, required all wills to be in writing and attested as thereby provided, but by s. 11 continued to soldiers on active service the privileges which they previously possessed. That left soldiers' wills on the same basis as that relating to all wills of personalty before the Statute of Frauds and the Wills Act.

[SCRUTTON L.J. referred to Swinburne on Wills, 4th ed., pp. 34, 35.]

In *Mathews* v. *Warner* (11), Lord Loughborough L.C. said:

(1) (1832) 4 Hagg. Ecc. 183, 187.
(2) [1902] P. 99.
(3) 4 Hagg. Ecc 199 n.
(4) (1828) 1 Hagg. Ecc. 222.
(5) (1814) 2 Phillim. 213.
(6) (1786) 1 Cox, 241.
(7) (1885) 29 Ch. D. 617.
(8) (1823) 1 Add. 389.
(9) (1814) 2 Phillim. 190.
(10) (1827) 1 Hagg. Ecc. 51.
(11) (1798) 4 Ves. 186, 208.

"Another part of the evidence here consists of facts and circumstances, the existence of which very much affects the question, whether there is a will, or not . . . . if such things are to be established as wills, it loudly requires the interference of the legislature to prevent such a latitude in that respect, as makes the disposing of all a man's fortune the most slight and trivial act, attended with much less of form, solemnity, and precision, than any act he could do with regard to any part of his property during his life."

[LORD STERNDALE M.R. That case is cited in Theobald on Wills, 7th ed., p. 58, for the proposition that "where there is an interval between the preparation of instructions for a will and the death of the testator, the instructions will take effect as a will only upon evidence that the testator adhered to them down to his death." Does it mean more than that ?]

It is submitted that it does.

[SCRUTTON L.J. In *Hattatt* v. *Hattatt* (1) an entry in an account book signed by the testatrix, and containing these words, "I intend this as a sketch of my will which I intend making on my return home," was pronounced for as a will. Sir John Nicholl there referred to *Mathews* v. *Warner*. (2)]

As to the jurisdiction of the Court of Probate as a Court of construction, the Court looks at the document and perhaps construes it so far as to say whether it ought to be admitted to probate.

A few phrases in a letter ought not to be given effect to as altering the deliberate intention of the testator as expressed in his formally executed will: *Henfrey* v. *Henfrey* (3); *In re Stable*. (4)

There ought to be some limit to soldiers' wills. There is evidence here that the testator did not intend this letter to be treated as his will. It was merely a note of instructions for the preparation of a formal instrument. The will and first codicil were clearly thought out. In order for the letter to be admitted to probate the Court must see that it represents the testator's final wishes as to the disposition of his property.

(1) (1832) 4 Hagg. Ecc. 211.
(2) (1798) 4 Ves. 186, 208.
(3) (1840) 2 Curt. 468.
(4) [1919] P. 7, 9.

C. A. 1920

GODMAN v. GODMAN.

[SCRUTTON L.J. referred to *Blewitt* v. *Blewitt*. (1)]

The letter is not a testamentary document at all and ought not to be admitted to probate so as to disturb a well-considered and formally executed will. [They also referred to *Read* v. *Phillips* (2), *Popple* v. *Cunison* (3), *Rymes* v. *Clarkson* (4) and *Walker* v. *Walker*. (5)]

Grazebrook (*Thorn Drury K.C.* with him) for the guardian ad litem of the infant defendant. The letter ought not to be admitted to probate. It is merely preparatory and not intended by the testator as his will. In an ordinary soldier's will the testator is probably dealing only with small sums, and it generally contains a very clear expression of intention as to the disposition of the property of the deceased; as in *In the Estate of Wardrop*. (6)

Hon. S. O. Henn Collins in reply. The guiding principle is to endeavour to carry out the testator's intention. Is this document deliberative only or is it an expression of the testator's final intention? If the Court is satisfied that it is the latter then it will disregard the formalities and admit it to probate.

Cur. adv. vult.

March 22. LORD STERNDALE M.R. This appeal from Horridge J. raises a question of importance as to the effect of a certain document which is alleged to be a valid soldier's will or codicil, and therefore a testamentary document which should be admitted to probate. If admitted to probate it is clear that it can only operate on the personal estate mentioned in it, and that it has no operation with regard to real property. The question is not so important since the passing of the Wills (Soldiers and Sailors) Act, 1918, which enables soldiers to deal by a soldier's will with realty as well as personalty. This Act does not apply to this will as the testator died before it was passed. [The Master of the Rolls then stated the facts as set out in the judgment of Horridge J. and continued:] The document which it is sought to admit

(1) (1833) 4 Hagg. Ecc. 410.
(2) (1813) 2 Phillim. 122.
(3) (1822) 1 Add. 377.
(4) (1809) 1 Phillim. 22.
(5) (1805) 1 Mer. 503, 507, 514.
(6) [1917] P. 54.

to probate gave instructions as to dispositions of the realty which he had acquired since the making of his will, and of personalty as to which there had been a change of conditions.

Before the Statute of Frauds, 29 Car. 2, c. 3, it was not necessary for wills to be in writing. That statute, by s. 5, required wills of realty to be in writing and attested by three witnesses; by s. 19 required certain conditions for a nuncupative will of personalty; and by s. 23 gave to soldiers on active military service the privilege of disposing of their personal property as they might have done before the Act. The Wills Act, 1837, repealed the provisions of the Statute of Frauds as to nuncupative wills, and required all wills to be in writing and attested with certain formalities mentioned therein, but by s. 11 continued the privileges previously granted to soldiers on actual military service. The effect of this legislation in my opinion is to leave the wills of soldiers subject to the same principles as those relating to all wills of personalty before the passing of the Statute of Frauds and the Wills Act. As might be expected there are few cases of modern date dealing with the question. It could not arise since the Wills Act, with regard to wills of civilians and the infrequency of wars of great magnitude involving this country, and the improved means of communication with soldiers on active service has prevented the occurrence of many cases of sailors' and soldiers' wills. It is necessary therefore to look back to the old cases to find the practice of the old Ecclesiastical Courts in such matters. There are many such cases to some of which we were referred by counsel, and to some of which we were not. I do not propose to discuss them in detail because I have had the advantage of reading the examination of them in the judgment to be delivered by Scrutton L.J., and I agree with that examination and the statement of the principles to be obtained from it so far as definite principles can be extracted from the cases. I think as I have already said that there is no different principle applicable to a soldier's will from that applicable to a civilian's, though it is possible that the Courts may have

C. A. 1920

GODMAN v. GODMAN.

Lord Sterndale M.R.

had a tendency to apply those principles less strictly in their endeavour to carry out a soldier's wishes.

It is also correct, I think, to say that it is not easy from these authorities to ascertain the proper application of these principles to any particular case. See Jarman on Wills, 6th ed., p. 127, where the author says: "But cases of this kind depend so much upon their particular circumstances, that little is to be learnt from general statements; and the inquirer into the subject is recommended to consult the cases referred to in the notes, a full statement of which the limits of the present work will not allow."

In this case, though I agree with Scrutton L.J. in his statement of the principles applicable, I regret that I differ from him as to their application to this particular document.

The fact that a document purports to be instructions for a more formal instrument is not of itself sufficient to prevent its being admitted to probate, and the fact that if admitted it will carry out only part of the testator's intentions, and not the whole, is not sufficient if the part carried out and the part not carried out are independent of one another. But if the effect be not to carry out the testator's intentions, then it should not be admitted.

It is necessary, therefore, to examine this document and its intention and effect. It is contained in the middle of a somewhat long letter written by the testator to his wife which deals with some matters of business and also with family affairs. The passage alleged to be testamentary is as follows: "Also tell Mattingly this affects my will, which I now want added to it at once, that as Whitbread & Co., Ld., have given the shareholders more leaving powers I wish Dick and Tommy to have my ordinary shares equally divided between them; also that Bankside and grounds are to be in case of my death yours for life and then Tommy's plus Bankside farm, the remainder of my property to be Dick's, otherwise the will holds good. You will please show him what I have written."

This is clearly on the face of it an instruction to his solicitor, Mr. Mattingly, to prepare some document which will effect an alteration in his will of the nature mentioned in the passage

I have read. The testator did not purport nor did he in my opinion intend to effect that alteration by means of the letter alone, but he contemplated the preparation and execution of a formal document, probably a codicil, for that purpose. There is however as I have shown ample authority for the proposition that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property. If a long time has elapsed since the writing of the informal document, and if, during that time, the testator had opportunities of obtaining the formal document of which he did not avail himself, that affords evidence that he had changed his mind; but if he dies very soon without having had such opportunities, the presumption is that the document is the last expression of his wishes. In this case the testator died before he had or in the circumstances could have received any answer to his letter, and therefore there is no reason to presume any change of mind. This fact however as is pointed out by Lord Selborne in *Whyte* v. *Pollok* (1) does not of itself establish the fact that the document should be admitted to probate as the expression of his final wishes. In *Whyte* v. *Pollok* (2) Lord Selborne says: "And with regard to all the cases which have been referred to, in which early death, sudden death, or anything of that kind, was a material circumstance, I do not at all understand that that circumstance was ever held to make an instrument testamentary which had no testamentary character independently of it." To ascertain this it is necessary to look at the document itself and consider its effect in connection with all the facts of the case.

Now this document purports to deal with both real and personal property and is inoperative as to the realty. That fact has been held to raise a presumption that it does not express the testator's wishes. In *Jekyll* v. *Jekyll* (3) Sir George Lee said: "I was of opinion the paper B could not

(1) (1882) 7 App. Cas. 400. (2) 7 App. Cas. 400, 405.
(3) 1 Lee, 419, 429.

C. A. 1920

GODMAN v. GODMAN.

Lord Sterndale M.R.

be pronounced for as deceased's last will, because it was very imperfect; the testator's name did not appear in it; it was not intelligible without explanation, and it was not explained by the evidence; contained real and personal estate, but could not operate as to the real; and yet he as much intended Lady Ann a benefit out of the real, as he intended the legatee a benefit out of the personal estate; he had sufficient time to have carried it into execution, but did not."

In *Douglas* v. *Smith and Brown* (1) the Master of the Rolls (Sir John Leach), dealing with a will in the Privy Council, said: "It will be observed in what I have stated, I entirely concur with what was urged by the learned gentleman who spoke last, that the mixture of the real and personal estate is not an irresistible presumption, it may be repelled. If a testator were to declare, notwithstanding that in my will I profess to create a common fund of real and personal estate yet still I mean that will to operate only as to my personal estate, or if any other circumstances be proved which import an intention such as that declaration would express, no doubt it would repel that presumption; but it is a circumstance of the strongest presumption, and which can only be repelled by clear evidence."

In *Tudor* v. *Tudor* (2) Sir John Nicholl said: "The will of 1826 disposing of real and personal estate must operate on the real estate: the instructions of the 9th May, 1830, and now propounded, were intended as a new will blending together both the real and personal estate: against such instructions the want of due execution is conclusive; for, where an unexecuted paper can only operate on the personal, and not on the real estate, if the disposition of the former arises from, and is dependent upon, and induced by, the disposition of the latter, the Court will not interpose to give even a partial operation to such a paper, for by so doing It would defeat the testator's intention. That was stated by Sir William Wynne in *Eyles* v. *Eyles* (3) to be the doctrine of these Courts. That learned Judge said in that case: 'There are many

(1) 3 Knapp, 1, 11. (2) 4 Hagg. Ecc. 199n.
(3) (1792) Hil. Term, By-Day.

instances where a testator having intended to dispose of real and personal estate, the Court has given effect to the disposition as far as it can, and pronounced for the one part conveying the personalty, in other cases it has refused to do so; the distinction is this, where the devise of the realty is perfectly independent of the disposition of the personalty, then, by giving effect to the unexecuted will, the deceased's intention pro tanto is carried into effect; but where one part appears to depend on the other, when a testator gives to A. because he has given to B., then it would defeat the intention, and be injustice to give effect to one, unless you could to the other.' " This last case is reported in a note to *Gillow and Orrell* v. *Bourne* (1) where the decision is cited with approval by Sir John Nicholl.

It is true that in these cases there were other circumstances pointing to the document not being an expression of the testator's wishes, but they establish the presumption I have mentioned. It is also pointed out in those cases that a document dealing with both real and personal property, and inoperative as to realty, may be admitted to probate as a will of personal property if the disposition of the personalty can be shown to be independent and intended to operate independently of the disposition of realty. This is stated in the judgment of Sir John Leach in *Douglas* v. *Smith & Brown* (2) which I have already cited. In this case I think no one can read this document without seeing that the dispositions of personalty and realty cannot be independent or intended to operate independently of one another; they taken together constitute the alteration which the testator instructed his solicitor to make in his will, and if he made the alteration as to personalty without making the alteration as to realty he would be making, not the alteration he was instructed to make, but another. I think the analysis by Horridge J. of the manner in which the dispositions of realty and personalty are connected (3) is correct, but I am content to say that the connection appears on the face

(1) 4 Hagg. Ecc. 192. (2) 3 Knapp, 1.
(3) [1919] P. 235.

C. A. 1920

GODMAN v. GODMAN.

Lord Sterndale M.R.

of the document. I think these circumstances are conclusive against admitting this document to probate. As I have already pointed out, the formal document which the testator instructed his solicitor to prepare would have effected all the alterations which the testator mentioned in this letter. The document itself, if admitted to probate, would effect not that alteration but one entirely different which the testator never expressed any wish of making and probably never considered.

I think the result of admitting this passage in the letter to probate would be as was said by Sir John Nicholl in *Tudor* v. *Tudor* (1) not to carry out, but to defeat, the testator's wishes. It was argued that this was no reason for not admitting the document to probate any more than the fact of one gift being void as being against the law of perpetuity, or some similar reason, would be. I do not think the analogy a true one. In that case the will would contain exactly the gift which the testator intended it to contain, but it could not be entirely carried out because the gift which it contained was contrary to law. In this case the document would be admitted to probate only as to personalty and the gift of the realty whether good or bad in law would be excluded from the will altogether, and therefore the alteration contemplated by the testator when he wrote his letter would not be carried out. I think the conclusion of Horridge J. was right though I have arrived at it by rather a different process of reasoning, and that the appeal should be dismissed.

WARRINGTON L.J. The question in this case is whether a passage in a letter written by a soldier on active service ought to be admitted to probate as a codicil to the writer's will. The document was originally admitted in the Registry but subsequently on application by the executors the probate was revoked by Horridge J. The document was dated prior to the coming into operation of the Wills (Soldiers and Sailors) Act, 1918, and was therefore ineffectual to dispose of real estate as it purported to do.

(1) 4 Hagg. Ecc. 199n.

The learned judge, following what he conceived to be the principle of the decision in *Tudor* v. *Tudor* (1), held that though in his opinion the document, if it had related to personal estate only, would have been entitled to probate, yet because it purported to deal with both real and personal estate and the gifts of the one were not shown to be independent of those of the other probate ought to be refused.

The testator made a will dated August 12, 1914. The provisions of this will which was prepared by a solicitor and duly executed are not material. It is enough to say that he gave an annuity to his wife and devised and bequeathed the residue of his real and personal estate to trustees upon usual trusts for conversion, the ultimate residue to be in trust for his children attaining twenty-one, with a gift over.

He made a first codicil dated August 8, 1915.

Subsequently he was wounded and taken prisoner and died in a German prison camp on October 12, 1917. Meanwhile on July 8, 1917, he wrote to his wife the letter in question. It deals with many matters including several matters of business and it contains the following passage : [His Lordship read the passage read by the Master of the Rolls and continued :] "Mattingly" was his solicitor, and "Dick" and "Tommy" were his two sons—Richard then aged seven or eight years, and Thomas about two years. The letter was received by Mrs. Godman some time in September, but she was away from home at the time and Mr. Mattingly did not see it till some time in October. It was then impossible to get a formal codicil executed. The son Richard died on July 15, 1918. Thomas is still living. It is not disputed that the testator was a soldier on active service both at the date of the letter and at his death. From the date of the Statute of Frauds, soldiers on active service and sailors at sea occupied a privileged position as regards nuncupative wills of movables, but as regards written wills of personal estate, and as regards wills of real estate they were in the same position as other people, that is to say a will of personal estate required for its validity neither signature

(1) 4 Hagg. Ecc. 199n.

C. A. 1920

GODMAN v. GODMAN.

Warrington L.J.

nor attestation, whereas a will of real estate required both.

Sect. 11 of the Wills Act preserves the privileges of soldiers and sailors as regards wills of personal estate. Wills of real estate required in their case the same formalities as those of civilians until the passing of the Wills (Soldiers and Sailors) Act, 1918.

The passage in question contained in the letter of July 8 is a message to his solicitor conveying his wishes as to the disposition of the property mentioned, and telling him it affects the will, and he wants the latter added to at once. That is to say it amounts to an instruction to the solicitor to "add" the particular dispositions to his will, and as no such addition can be made by the solicitor himself, it in effect instructs him to prepare the necessary codicil and to send it out to the testator for signature. The document does not purport to be in itself a codicil, but contemplates the preparation and due execution of another document for the purpose of giving effect to the testator's wishes.

It must I think be conceded that, before the Wills Act, a document of that nature dealing with personal estate only would have been admitted to probate, provided it were proved, either by internal evidence or by other facts, that the document expressed the final intentions of the testator, and that the coming into existence of the further document was prevented by the death of the testator, or by the happening of such an event as is commonly referred to as an act of God. Instances are to be found in *Hattatt* v. *Hattatt* (1) and in *Burrows* v. *Burrows* (2), both cases in which personal estate alone was dealt with. In fact such cases appear to have been of every day occurrence: [see per Sir J. Nicholl in *Gillow and Orrell* v. *Bourne* (3)].

Where however the instructions deal with real estate as well as with personal estate it is obvious that different considerations arise. In order that the contemplated disposition may be effective as to real estate certain formalities are

(1) 4 Hagg. Ecc. 211. (2) (1827) 1 Hagg. Ecc. 109.
(3) 4 Hagg. Ecc. 192, 202.

requisite, and to give effect to an informal document would certainly carry out a part only of the testator's intention, and might defeat it altogether.

Accordingly we find that in some cases a document purporting to be instructions for a draft of a will has been admitted to probate, and in others it has not. Examples of the former class of cases are *Huntington* v. *Huntington* (1); *Cary* v. *Askew* (2); *Hyde* v. *Hyde*. (3) Examples of the latter class are *Jekyll* v. *Jekyll* (4), *Tudor* v. *Tudor* (5) and *Gillow and Orrell* v. *Bourne*. (6)

The distinction appears to be this, that the mere fact that the informal document purports to dispose of real estate is not of itself enough to prevent the grant of probate. If it were, every will of personal estate containing a devise of realty would, before the Wills Act, have been invalid, even as to the personalty, unless it complied with the formalities requisite to a valid devise of realty. But if the nature of the document or external circumstances indicate that it was not the intention of the testator that one part only of his wishes should be carried out, then to admit the document in question to probate would defeat his intention.

The question seems to me to be wholly one of intention. The Court is asked under certain circumstances to give effect to a document which, when it was prepared, was imperfect. If it can do so without defeating the testator's intention it will give relief although his intention cannot be fully carried out.

In *Jekyll* v. *Jekyll* (7) Sir George Lee in refusing probate of a paper purporting to be instructions for a will of real and personal estate said, amongst other reasons for his decision, that the document "contained real and personal estate, but could not operate as to the real; and yet he as much intended Lady Ann a benefit out of the real as he intended the legatee a benefit out of the personal estate."

In *Tudor* v. *Tudor* (5) Sir John Nicholl said: [His Lordship

(1) 2 Phillim. 213.
(2) 1 Cox, 241.
(3) 1 Eq. Cas. Abr. 409.
(4) 1 Lee, 419.
(5) 4 Hagg. Ecc. 199n.
(6) 4 Hagg. Ecc. 192.
(7) 1 Lee, 419, 429.

C. A. 1920

GODMAN v. GODMAN.

Warrington L.J.

read the passage from that case above set out in the judgment of Lord Sterndale, and continued :] In referring to cases where the gifts of realty and personalty are interdependent I think the learned judge is not giving an exhaustive list of cases in which probate would be refused but only certain examples. The principle upon which the Court proceeds is in my opinion expressed in the phrase "It would defeat the testator's intention."

Applying these principles to the present case I have come to the conclusion that this letter ought not to be admitted to probate.

In the first place it does not purport to do more than direct some alterations in or additions to the will. The formal document contemplated would have been a codicil, and a codicil to a properly drawn and properly attested will. Now it would seem that in the Ecclesiastical Courts there was a certain leaning against admitting to probate an imperfect document of such a nature: see *Blewitt* v. *Blewitt*. (1) The same idea is I think indicated in some parts of the judgment in *Rymes* v. *Clarkson*. (2)

As to the document itself I cannot say the gifts of realty and personalty arise out of each other, but I think they are so far dependent on each other that it would defeat the intention of the testator if effect were given to the gift of personalty alone. The will would stand unaffected by the codicil so far as realty is concerned, and the operation of the two documents—the will and the informal codicil together—would be so different from that of the will and the contemplated formal codicil that I think it would be wrong for the Court to bring about such a result.

In my opinion the appeal ought to be dismissed.

SCRUTTON L.J. Mr. Godman, an officer in the British Army, became a prisoner of war in Germany. He had made a will before leaving England, but had afterwards bought some more landed property, and by the alteration of the articles of Whitbread & Co., Ld., a company in which he was largely

(1) 4 Hagg. Ecc. 410, 464. (2) 1 Phillim. 22.

interested, had acquired greater powers of disposing of his shares in that company. Under these circumstances, he wrote to his wife a letter containing the following passage: [His Lordship read the passage read by the Master of the Rolls and continued:] I understand this to mean "I wish certain newly acquired property at my death to pass in the way specified; in other respects my existing will holds good, but as my wishes affect my existing will in some respects tell my solicitor to draft for me at once a formal document carrying out these wishes and send it to me for execution."

The letter was late in reaching the solicitor and before he had drafted any document Mr. Godman died in the German prison.

The Probate Court originally admitted to probate the will and a codicil and the letter. But when the question of construction came before Peterson J., he doubted whether the letter was properly admitted to probate and adjourned the summons that an application to revoke probate might be made to the Probate Division. On this application Horridge J. revoked probate. He held that the letter was a good soldier's will though it contemplated the preparation of a further document; but that as owing to the absence of witnesses it could not pass the real estate and, as in his view the bequests of personalty were dependent on the bequests of realty being valid, he declined by granting probate to give effect only to part of the testator's intentions.

Before the Statute of Frauds (29 Car. 2, c. 3) it was not necessary for wills to be in writing. A nuncupative will when the testator orally declared his will before a sufficient number of witnesses was good if clearly proved. In 1676 (*Cole* v. *Mordaunt* reported in a note to *Mathews* v. *Warner* (1)) a remarkable case was fought where it was endeavoured to prove a nuncupative will by nine witnesses most of whom were afterwards convicted of perjury or subornation thereof. In dealing with the case Lord Nottingham is reported to have said "I hope to see one day a law that no written will should be revoked but by writing."

(1) 4 Ves. at p. 195.

C. A. 1920

GODMAN v. GODMAN.

Scrutton L.J.

And this is said to be the principal case which gave rise to the Statute of Frauds. By that statute (s. 5) all devises of lands must be in writing attested by three witnesses (s. 19), no nuncupative will should be good except under certain very strict conditions contained in ss. 20, 21, 22, but by s. 23 any soldier being on actual military service might dispose of his personal estate as he might have done before the making of the Act. A soldier therefore after the Act (1.) could not make a will as to land except in writing with three witnesses, (2.) could make a will as to personalty in writing without any particular formalities, none being then imposed on written wills, (3.) could still make an oral or nuncupative will with sufficient witnesses disposing of personalty, but not of realty, free from the restrictions of the Statute of Frauds. Further in my view he was a privileged person in the sense that his will-making operations were construed benevolently and without insisting on formalities. If his will was in writing by his direction, it need not be signed or even seen by him if it was proved to be his testamentary wish. "For as much as soldiers being better acquainted with weapons than books, are presumed to have so much the less knowledge in the laws of peace, ... As well therefore in regard of their small skill in our peaceable laws on the one side; as in recompense of their great perils and hurts in furious and cruel battles on the other side, they enjoy many notable privileges and benefits in the making of their testaments." (1)

When the Wills Act repealed the provisions of the Statute of Frauds as to nuncupative wills, and required all wills to be in writing attested with certain formalities, s. 11 of the Wills Act still provided that any soldier being on actual military service might dispose of his personal estate as he might have done before the making of that Act. The soldier therefore remains at liberty to make an informal oral or written will of personalty, realty requiring the formalities of the Wills Act, 1837, and both are frequently described in the cases as "nuncupative," a term originally applied to oral wills only.

(1) Swinburne on Wills, 4th ed., p. 33.

After the passing of the Wills Act in 1837 the question could no longer arise as to civilian wills and, wars being fortunately few, there were not many cases as to soldiers' wills. As a result, the law as to informal documents, well known before 1837 to the practitioners in the Ecclesiastical Courts, dropped out of mind. Lord Blackburn in 1882 in *Whyte* v. *Pollok* (1), says: "In England, before the Act of Victoria, as far as regarded personal property, there were some cases, which, as it was before my time, I have never had occasion to look at, and upon which I certainly should not express an opinion." What Lord Blackburn did not know in 1882 the Court of Appeal and counsel had some excuse for being unfamilar with in 1920. This probably explains the fact that we were not referred by counsel to a large number of decisions relevant to the question in issue which the Court has had to find out and endeavour to understand for itself. I have looked at many cases to some of which I refer below, and after considering them I think the law of the Ecclesiastical Courts stood thus: There was a class of document containing an expression of the writer's wishes as to the disposition of his property at his death which might be admitted as a will though it contained ambiguous expressions, if the Court were satisfied by parol evidence and by the document itself that it really was a fixed and final expression of the testator's wishes, and not a mere deliberative and temporary document compiled for consideration and not for stating final intention. This class of case is elaborately discussed by the House of Lords in *Whyte* v. *Pollok* (2), where the document was headed "Notes of intended settlement by" but was admitted to probate as a perfect will. Similar instances of admission to probate are *Barwick* v. *Mullings* (3): "This is a memorandum of my intended will" where Sir John Nicholl says: "Even if the deceased had at this time expressly declared that he intended to have a will formally prepared, still this paper would be deemed his will till he had executed a more formal instrument"; *Hattatt* v. *Hattatt* (4): "I

(1) (1882) 7 App. Cas. 421.
(2) 7 App. Cas. 400.
(3) (1829) 2 Hagg. Ecc. 225, 228.
(4) (1832) 4 Hagg. Ecc. 211.

C. A. 1920

GODMAN v. GODMAN.

Scrutton L.J.

intend this as a sketch of my will which I intend making on my return home," which Sir John Nicholl says: "must be presumed valid and intended to take effect in case the deceased did not make a more formal paper;" *Torre* v. *Castle* (1): "Head of instructions," "Memorandum," a most informal will of the Earl of Scarborough. There Sir Herbert Jenner said: "But these cases and a variety of others that might be cited, show, that whatever may be the form of the instrument, whatever may be its appearance, whatever may be its construction, in whatever terms it may have been expressed, or on whatever material it may have been written, still the Court has only to inquire, was it the intention of the testator that that document should operate as his will? However informal or imperfect it may be, if you can be satisfied that the deceased did intend it to operate as his will, this Court is bound to give effect to it." See also *Bone* v. *Spear* (2), *Burton* v. *Collingwood* (3) and *In the Goods of Slinn*. (4) On the other hand the memorandum was held "deliberative" or "initiatory" and not admitted to probate in *Mathews* v. *Warner* (5); "only a project of a will," not a complete definite rule of law for settling his fortune. See also *Blewitt* v. *Blewitt* (6); *Elsden* v. *Elsden* (7); *Gillow and Orrell* v. *Bourne* (8); *Bragge* v. *Dyer*. (9) But there was a second class of imperfect or unfinished documents, where the writer obviously contemplated doing something more. To admit such a document to probate two conditions were required. They are stated by Sir John Nicholl in *Theakston* v. *Marson* (10): "first, that the deceased had finally decided to make the disposition of his property expressed in the imperfect paper" —the fixed and final testamentary intentions of the deceased as to the disposition of his property—"Secondly, that he never abandoned that intention, and was only prevented by the act of God from proceeding to the completion of his

(1) (1836) 1 Curt. 303, 319.
(2) (1811) 1 Phillim. 345.
(3) (1832) 4 Hagg. Ecc. 176.
(4) (1890) 15 P. D. 156.
(5) (1798) 4 Ves. 186.
(6) (1833) 4 Hagg. Ecc. 410.
(7) (1832) 4 Hagg. Ecc. 183.
(8) (1831) 4 Hagg. Ecc. 192.
(9) (1830) 3 Hagg. Ecc. 207.
(10) (1832) 4 Hagg. Ecc. 290, 297, 299.

will "—"that the deceased, having the firm intention to give effect to the instrument in a more formal state, had no opportunity of proceeding to complete that intention, inasmuch as his further progress was arrested by the act of God, by death or some other supervening inability." See also *Jameson* v. *Cooke* (1); *Burrows* v. *Burrows*. (2) There appears to be no doubt in the present case that if there was a fixed and final intention the second condition was fulfilled. The writer of the letter of instructions died before his draft will could be returned to him for execution. It was not a case of an unfinished instrument and long unexplained delay as in *Abbot* v. *Peters* (3), *Dingle* v. *Dingle* (4) or *Elsden* v. *Elsden*. (5) The decision of Sir Francis Jeune in *Gattward* v. *Knee* (6) in favour as a soldier's will of the letter: "You will receive the lot if I am killed in action, for I shall make out my will in your favour" appears to be in accordance with these principles. He says: "No doubt he had in his mind to draw up a more formal will, but that does not in the least prevent this document taking effect if he had not an opportunity, which I suppose he had not, to execute a less informal document." The first part of Horridge J.'s judgment appears to me accurately to express the law, and I agree with it and with his decision in *Dalrymple* v. *Campbell*. (7)

The real question of difficulty arises on the first condition of admissibility: "the fixed and final intention." Horridge J. has revoked the probate on the ground that the document does not comply with the necessary formalities for wills of realty, and that the bequests of personalty are dependent on the bequests of realty—"indivisibly connected with them." For this he cites *Gillow* v. *Bourne* (8) and *Tudor* v. *Tudor*. (9) In the former case Sir John Nicholl says (10): "But it must be clearly shewn that the testator had finally made up his mind, and that the execution of the

(1) (1827) 1 Hagg. Ecc. 82.
(2) 1 Hagg. Ecc. 109.
(3) (1833) 4 Hagg. Ecc. 380.
(4) (1833) 4 Hagg. Ecc. 388.
(5) 4 Hagg. Ecc. 183.
(6) [1902] P. 99, 102.
(7) [1919] P. 7.
(8) 4 Hagg. Ecc. 192.
(9) 4 Hagg. Ecc. 199n.
(10) 4 Hagg. Ecc. 202.

C. A. 1920

GODMAN v. GODMAN.

Scrutton L.J.

instrument was prevented by the act of God, as it is termed, and that the disposition of the personalty was in no degree induced by, or dependent upon the disposition of the real property." In the latter case he repeats the latter part of the remark and cites Sir William Wynne in *Eyles* v. *Eyles* (1): "There are many instances where a testator having intended to dispose of real and personal estate, the Court has given effect to the disposition as far as it can, and pronounced for the one part conveying the personalty, in other cases it has refused so to do; the distinction is this, where the devise of the realty is perfectly independent of the disposition of the personalty, then, by giving effect to the unexecuted will, the deceased's intention pro tanto is carried into effect; but where one part appears to depend on the other, when a testator gives to A. because he has given to B., then it would defeat the intention, and be injustice to give effect to the one, unless you could to the other." I have great difficulty in following this reason as stated. It appears to treat the will as contingent: "if my wishes as to realty are carried out, then, and then only these are my wishes as to personalty." There are a large number of cases as to contingent wills collected in Williams on Executors, 10th ed., vol. i., p. 136, where the test is stated to be "if the will is made dependent on the contingency occurring, its validity will depend on the happening of the contingent event, but that if the contemplated possible event is merely the reason of the making of the will, it will be valid and effectual in any event." Whether a bequest was conditional, or merely motived and induced by a certain event would seem to be a question of construction rather than probate. If a testator informally expressed his views as to the disposition of his land and these views were frustrated by the Statutes of Mortmain or the doctrine of perpetuities it would not seem to be a ground for interfering with his bequests of personalty, unless the latter were conditional on the validity of the disposition as to land. And there are a number of other cases as stated by Sir W. Wynne where bequests of personalty were held good though devises of

(1) (1792) Hil. Term, By-Day.

realty failed, where it is difficult to see why the reasons stated above did not apply.

In *Habberfield* v. *Browning* (1) a very quaint letter as to real and personal property was admitted to probate as to personalty though void as to realty. So also in *Cobbold* v. *Baas*. (2) In *Masterman* v. *Maberly* (3) there was a formal and regular will and two codicils and an unexecuted will and three bonds. The formal will dealt with residue real and personal; the unexecuted will varied the disposition of the will. Sir John Nicholl admitted the unexecuted documents to probate, though he admitted that part of the testator's intention was defeated. In argument he expressed himself thus: "The practice of taking two papers as together containing the will, is, in strict principle, for the purpose of supplying imperfections in the disposition of personalty by the later paper: though, perhaps, for the convenience of parties it may be extended to cases where a latter paper, the execution thereof being prevented by the arrest of death, operates as to all the personalty; but not as to the realty which would pass under the former executed paper. Where a subsequent paper is merely codicillary, then no difficulty arises." In *Thorold* v. *Thorold* (4) an irregular document dealing with real estate and its proceeds was admitted to probate as regards the personalty: "if any part should be personal .... for that part the probate ought to pass, supposing the instrument to be in its nature testamentary." In *Hyde* v. *Hyde* (5) there was an unrevoked will as to real and personal estate, and an informal will with different dispositions as to real and personal estate. The Court rejected the second will as to realty, and held it good as to personalty making complicated arrangements as to the funds out of which the legacies should be paid. Lord Scarborough's will in *Torre* v. *Castle* (6) seems to be a similar case. In all these cases it might have been said that the testator might have made different dispositions as to personalty, if he had known that

(1) (1773) 4 Ves. 200n. (a).
(2) (1781) 4 Ves. 200n. (b).
(3) (1829) 2 Hagg. Ecc. 235, 236.
(4) (1809) 1 Phillim. 1, 9.
(5) 1 Eq. Cas. Abr. 409 (3).
(6) 1 Curt. 303.

C. A. 1920

GODMAN v. GODMAN.

Scrutton L.J.

his disposition as to realty would not be carried out, but this did not stop the Court from admitting the second document to probate as to personalty though void as to realty.

It appears to me that in the cases where invalidity of disposition of realty has been used to exclude from probate documents expressing wishes as to personalty one of two things has happened. Either (1.) the dispositions as to personalty have been inextricably mixed with those as to realty, or (2.) the circumstance has been used as evidence that the alleged testator, considering the knowledge he must have had, had not made a fixed and final disposition of his property. An instance of the first reason is *Douglas* v. *Smith and Brown* (1) where the debts were chargeable on the real and personal estate, and the Master of the Rolls, amongst other grounds against final and deliberate intentions, put this, that having charged his debts on a joint fund he could not have intended as final a disposition which only left them chargeable on personalty. An instance of the second reason is *Calamy and Limbery* v. *Hyde and Mason* (2) where the Court said : " This paper cannot operate as to the real estate, and the deceased being a lawyer, must know so much," while in *Jekyll* v. *Jekyll* (3) Sir G. Lee puts as one of the numerous reasons against the document being a final disposition that it contained real and personal estate but could not operate as to the real. See also *Elsden* v. *Elsden* (4) and *Reay* v. *Cowcher* (5) where Sir John Nicholl said : " But further ; his will, all written with his own hand, is signed and sealed, and was executed in the presence of three witnesses : he was aware, therefore, of the necessity of having three witnesses to a devise of real property ; and part of the residue is real ; if, then, he had intended this paper to operate, it is to be inferred he would have had witnesses." Compare this, however, with *Mitchell* v. *Mitchell* (6) where a clause in the informal document as to guardianship could not take effect because not attested under 12 Car. 2, c. 24, s. 8, or as to the land of the

(1) 3 Knapp, 1.
(2) (1731) 1 Lee, 423n.
(3) 1 Lee, 419.
(4) 4 Hagg. Ecc. 183.
(5) (1829) 2 Hagg. Ecc. 249, 254.
(6) (1828) 2 Hagg. Ecc. 74.

West Indian partnership, because there were not three witnesses. The Court allowed neither of these matters to hinder the admission of the document to probate, saying of the guardianship: "for the law requiring two witnesses to render such an appointment by will effectual is not by any means so generally known as that which renders essential the formal attestation of a will as to realty"; and of the West Indian land, "the deceased may not have regarded this property as subject to such provisions."

On these principles it seems to me that one cannot infer in this case that the deceased did not finally state his wishes for the disposal of his property, because those wishes were not attested as required by the law then in force as to soldiers' wills. There is no reason to believe that as a soldier he knew anything about what made a good soldier's will.

Did he in fact state his final wishes as to the disposal of his property? He was dealing with property acquired since his last will, nearly all since his codicil, which he did not wish to pass under the provisions of that will and codicil. To refuse probate to this document will, it appears to me, defeat his wishes as to personalty and put part of his realty under a will, made when he did not possess that part, and under which he did not intend that part to come. It will defeat his wishes in both respects. To admit the document to probate will fulfil his wishes as to personalty, though those as to realty cannot be carried into effect. It seems to me the lesser of two evils, and has the merit of giving partial effect at least to the wishes of a soldier, expressed while a prisoner of war, which he was prevented from finally and completely carrying out by his death.

If the true construction of this document is that the bequests of personalty are conditional on the devises of realty being valid the Court of construction can deal with this construction. If it is merely that the reason for one was the existence of the other this is, I think, not enough reason to refuse probate. On this ground all the cases where the document was admitted as to personalty should have been decided the other way. After the best consideration I can give to the authorities

C. A. 1920

GODMAN v. GODMAN.

Scrutton L.J.

in the Ecclesiastical Courts before 1837, the relevant decisions for our guidance, I think those Courts would have admitted this letter to probate, especially in view of the fact that it was the letter of a soldier who could not be presumed to know the law, as to whom therefore they could not draw the inference that because the letter was invalid as to real property he could not have intended it to be a final expression of his wishes. And I cannot see any ground for thinking that the bequests of personalty are so clearly conditional on those as to realty being valid that I should withdraw these considerations from a Court of construction. While I agree with the first part of the judgment of Horridge J. as to the qualities of a soldier's will I think he was too strict in the reason for which he refused the soldier's letter probate. In my view therefore the appeal should be allowed.

I regret my difference with my brethren which appears not to be on principles but on their application. But, in view of the fact that the Soldiers' and Sailors' Wills Act of 1918 now gives the soldier the same privileges in respect of real property that he has enjoyed as to personal property, our difference is no longer of any general importance.

Appeal dismissed.

Solicitors for appellant: *Theodore Goddard & Co.*
Solicitors for executors: *Thompson & Mattingly.*
Solicitor for infant respondent: *E. J. Stokes.*

G. A. S.

[BEFORE THE NAVAL PRIZE TRIBUNAL.]

(In Prize.)

1920

Jan. 30,
March 12.

THE FELDMARSCHALL.

Naval Prize Tribunal—Combined Naval and Military Operations—Joint Captors—Division of Proceeds—Droits of the Crown and Droits of Admiralty—Naval Prize Act, 1918 (8 & 9 *Geo.* 5, *c.* 30).

In the course of the combined naval and military operations in German East Africa a German steamship was captured in the harbour of Dar-es-Salaam under circumstances which, although they constituted a joint enterprise, in the opinion of the majority of the tribunal, did not constitute a joint capture but a capture by the naval forces alone, and that accordingly the claim put forward on behalf of the military forces to share as joint captors was not established:—

Held, however, by all the members of the tribunal, that if the claim of the military forces to share as joint captors had been established, the proceeds of sale of the captured ship would be partly a droit of Admiralty and partly a droit of the Crown; that the portion allocated to the military forces would be a droit of Admiralty and, therefore, payable to the Exchequer to be dealt with by the Crown as it might be advised; and that the portion allocated to the naval forces would be a droit of the Crown and payable to the Naval Prize Fund in accordance with the provisions of the Naval Prize Act, 1918.

In this case the ruling of the Naval Prize Tribunal was sought by the Exchequer and the Army on the right of the Army to share in the proceeds of sale of the German steamship *Feldmarschall*, captured during the naval and military conjoint operations in German East Africa.

The *Feldmarschall* was captured on September 4, 1916, in the port of Dar-es-Salaam. The capture was actually effected by officers and men from the squadron under the command of Admiral Charlton, but it was contended that the land forces under General Smuts lent such assistance in the operations as entitled them to be considered as joint captors. The facts are fully stated in the judgment of Lord Phillimore and in the dissenting judgment of Sir Guy Fleetwood Wilson.

Pearce Higgins (*Sir Gordon Hewart A.-G.* with him) for the

1920

THE FELD-MARSCHALL.

Exchequer and the Army. Under the old practice joint captures were excluded from the grant of prize to the captors, being specially reserved to the Crown : see *The Hoogskarpel* (1), referred to in Rothery's Prize Droits, p. 25. As a result of this case a clause was introduced in the next Prize Act (33 Geo. 3, c. 66) and all subsequent Prize Acts and Proclamations thereunder, by which the Crown reserved to itself the division and distribution of all prizes and booty taken in conjoint expeditions, and at its own discretion the Crown divided the proceeds between the forces engaged. There is, however, no such express reservation in the Naval Prize Act, 1918, and the question is whether such prizes have been reserved to the Crown or have been ceded to the Fleet under the general words, "droits of the Crown," used in that Act and in the Prize Proclamation issued thereunder.

In *The Hoogskarpel*, which was a Dutch East Indiaman captured in 1781 in conjoint naval and military operations, the statute (21 Geo. 3, c. 15) provided that the naval forces should have the sole interest and property of and in every ship taken and finally adjudicated lawful prize. Sir J. Marriott, however, pronounced "for the interest of the Army agreeably to the spirit of His Majesty's instructions." There was an appeal, the Fleet contending that under the statute the prize was appropriated to the Navy, the Army contending that the Prize Act could not have been meant to favour the interest of the Navy in so exclusive a manner as to derogate from the Crown's right of appropriating to the Army a certain share of a prize taken in joint operations. The judgment on appeal pronounced the ship and cargo to have been taken by conjoint operations and condemned them as lawful prize. It is submitted that the Naval Prize Act, 1918, and the Proclamation thereunder must be construed in the same way, and that the words "ships being droits of the Crown" must be construed as meaning ships

(1) (1781–6) Unreported. The details of this case and the judgments of the Prize Court and the appellate tribunals, so far as it was possible to ascertain them, are fully set out and discussed in the judgment of Lord Phillimore, post, pp. 302.

captured by the Fleet alone and as excluding conjoint captures.

1920

THE FELD-MARSCHALL.

[LORD PHILLIMORE. It would appear from *The Twee Gesuster* (1) and *Le Franc* (2), reported in a note to *The Cape of Good Hope*, that conjoint captures may be partly droits of the Crown and partly droits of Admiralty.]

In that event, assuming the *Feldmarschall* to have been captured under circumstances which constituted a joint capture, the portion of the proceeds appropriated to the military forces would be a droit of Admiralty to be dealt with by His Majesty as he might be advised. On the facts this was a joint capture: see *The Dordrecht* (3) where the principles under which concerted operations may amount to a joint capture were laid down, and *La Bellone* (4) where *The Hoogskarpel* is referred to. [Reference was also made to *The Stella del Norte* (5), *Genoa and Savona* (6) and *Tarragona*. (7)]

Sir Reginald Acland K.C. and *Darby* for the naval forces. The *Feldmarschall* may have been captured as the result of joint naval and military operations, but the capture itself was not a joint capture. There is no case in which a ship or a military force has been held entitled to share as a joint captor when not actually present at the capture. There was no preconcerted joint action for the capture of the vessel, and the military forces were probably unaware of her existence: see *Naples Grant*. (8)

[LORD PHILLIMORE referred to the judgment of Dr. Lushington in *Banda and Kirwee Booty*. (9)]

As regards the suggestion of the Tribunal that the proceeds may be partly a droit of the Crown and partly a droit of Admiralty, in the cases of *The Twee Gesuster* (1) and *Le Franc* (2), referred to in support of the proposition, some of

(1) (1799) 2 C. Rob. 284n.
(2) (1799) 2 C. Rob. 285n.
(3) (1799) 2 C. Rob. 55.
(4) (1818) 2 Dods. 343, 350.
(5) (1805) 5 C. Rob. 349.
(6) (1820) 2 Dods. 444.
(7) (1821) 2 Dods. 487.
(8) (1818) 2 Dods. 273.
(9) (1866) L. R. 1 A. & E. 109, 136.

1920

THE FELD-MARSCHALL.

the vessels concerned were non-commissioned captors, but in the present case both forces were commissioned.

[LORD PHILLIMORE. I think it has been held that the Army ranks as a non-commissioned captor.]

The true inference from *The Hoogskarpel* is that where there is no section of an Act of Parliament dealing with the question of droits, they are reserved droits and therefore droits of the Crown even if the result of a joint capture, and the Crown can do what it likes with them; and, by the Proclamation of 1918, the Crown has chosen to give them to the Navy. [*The Rebeckah* (1) and *The Galen* (2) were also referred to.]

Pearce Higgins replied.

Cur. adv. vult.

March 12. LORD PHILLIMORE. In this case a claim has been preferred on behalf of the Treasury that the capture should be treated as one made by joint captors, the ship having been actually taken by the squadron under Admiral Charlton, but it is suggested that the land forces under General Smuts so far contributed to the success of the operations as to entitle them under the rules of prize law to be considered as joint captors.

The *Feldmarschall* had apparently been in the port of Dar-es-Salaam since the beginning of the war. Dar-es-Salaam was attacked several times in the earlier stages of the war by the British naval forces, and in November, 1914, an arrangement was made, the town being incapable of defence at the time, under which a detachment from the British Navy was allowed to enter the harbour and dismantle the engines of the *Feldmarschall*, so that she should not proceed to sea, and she remained unable to proceed to sea, but afloat, till the surrender on September 4, 1916.

In the summer of 1916 General Smuts decided on a definite forward movement from north to south, first of all upon the railway that runs nearly due west inland from Dar-es-Salaam and then onwards towards the southern confines of

(1) (1799) 1 C. Rob. 227. (2) (1815) 2 Dods. 19.

German East Africa. Arrangements were made that the Fleet should co-operate with his forces, and Colonel Price was actually on board the flagship; but the Navy was held back to a certain extent, as it was not desirable to drive the German forces out of the seaport itself until a sufficient advance had been made by the main force about 100 miles inland to cut them off.

General Smuts' forces were divided into three columns: the east coast column under Colonel Price; the central column, which moved southwards, under General Smuts himself; and a column starting from a point much further west and marching south-east under General Van Deventer.

The first success was the capture in July of Tanga by the Army. The next was the capture of Bagamoyo by the squadron on August 15. The next important act was the defeat of the enemy by General Smuts' central column on the Wami river which led to the occupation of the railway at Morogoro on August 26.

The squadron which had been held back, as already said, was then allowed to proceed to bombard Dar-es-Salaam, and arrived off that port on September 1, and made a heavy bombardment on the 3rd. Troops, in the meanwhile, were advancing from Bagamoyo which was thirty-five miles to the north, and was left in the evening of September 2. On September 4, about 10.30 A.M. a representative of the civil population came out to the Fleet and surrendered the town stating, as was the case, that all the German forces had left it on the 2nd. Thereupon the Navy landed bluejackets and marines, and took possession of the town and of the ship, this being accomplished about noon. The troops from Bagamoyo arrived later in the afternoon at 5 P.M.

It is, therefore, in my opinion established that the *Feldmarschall* was captured by the squadron and by the squadron alone, and that, in fact, the town and harbour and vessel could have been captured many days before if it had not been that at the request of the Commander-in-Chief of the Army the operations of the Fleet were held back.

But it is said that the German forces had been induced

1920

THE FELD-MARSCHALL.

Lord Phillimore.

to evacuate the town through the fear of being cut off by the main forces of the Army which had before that date already seized upon the line of railway and were in process of moving further south. It is also said that, if Dar-es-Salaam had been occupied before the enemy had been driven from the line of railway, troops might have been sent down from the enemy headquarters at Morogoro, and have turned out any forces which the squadron might have landed. Both these facts may be so; but, at the same time, it remains that the bluejackets and marines which could be landed from the squadron with the help of the squadron's guns could have taken Dar-es-Salaam in the face of all the German force that was there, and could have held the town at any rate till a considerable force had been sent down by rail from Morogoro.

The operations in which both sea and land forces were engaged constituted a joint enterprise; but it does not follow from this that a prize taken in the course of a joint or combined enterprise is to be deemed a joint capture. Upon this branch of the law it may be desirable to quote the judgment of the Lords Commissioners of Appeals in Prize Causes in *The Nordstern* (1): "The sole question upon which this case must be decided, and which has therefore, in the course of the argument, been principally attended to, is whether it is sufficient to establish a right to share on the part of asserted joint captors, that the capture shall take place during the time of a joint enterprize. Upon this we are decidedly of opinion that it is not sufficient a joint enterprize shall exist at the time, except it expressly refer to the capture in question, or, in other words, that the capture grow out of the purpose and object for which the parties have been united, and be the joint produce of an actual co-operation, and the object of union. We therefore confirm the sentence appealed from, and reject the claim on the part of the remainder of the fleet."

The case just quoted, like most cases which are to be found in books upon the subject, is the case of a claim as between

(1) (1809) 1 Acton, 128, 140.

ships; and with the exception of the passage which has just been quoted, there is not much assistance to be got from them for the purpose of the case now before the tribunal; but there are cases in the books of claims by land forces to share with the naval forces of the Crown, and there are many cases of decisions given by high authorities in the Government, though not actually judicial decisions, as to the claims of different land forces to share in booty captured by one force. There is finally the most important case, that of *The Banda and Kirwee Booty* (1), decided in the year 1866, and from this latter case much assistance can be obtained.

There were two occasions in which ships were captured in Suldanah Bay, actually captured by the Fleet, but said to be cases of joint captures by Fleet and Army. On the first occasion, which was in the year 1781, the question was raised as to the ship *Hoogskarpel*, and on that occasion the Prize Court held that it was a case of joint capture, and some very curious legal results followed thereupon. The second occasion was in the year 1796, and gave rise to the decision in *The Dordrecht.* (2) Sir William Scott in a very elaborate judgment decided that it was not a case of joint capture. No doubt in that particular case he decided that there was no pre-concert, and this finding underlies a great part of his judgment; but he lays down the following propositions: that when possession has been taken by one force, and a claim of joint capture is set up, the onus probandi lies upon those claiming to be captors; that they must prove actual co-operation; and that there must be a contribution of actual assistance.

In *The Stella del Norte* (3) the question of co-operation between land and sea forces was raised in a strange manner. The claim actually put forward was a claim on the part of the Fleet under the command of Lord Keith to share in the capture of certain vessels taken by ships detached from the Fleet to act in concert with the Austrian forces on the coast of Genoa for the purpose of driving the French forces out of

(1) L. R. 1 A. & E. 109. (2) 2 C. Rob. 55.
(3) 5 C. Rob. 349, 354.

1920

THE FELD-MARSCHALL.

Lord Phillimore.

that country. The actual ships were said to have been captured in co-operation with the Austrian forces because the Austrians had driven away the garrison from a battery under the protection of which they had been lying. The claim of the rest of the Fleet was endeavoured to be supported in the following manner: There had been an agreement between Lord Keith and the commander of the Austrian forces that all booty made on the expedition should be divided equally between the two forces, and it was accordingly contended that in that way the whole of the Fleet could come in and have a share. Sir William Scott points out that an agreement made between A. on the one side and B. and C. on the other, that B. and C. should share jointly with A. in any booty taken, does not, per se, give any rights to B. as against C.; but he does proceed to consider, first, whether the case was made out without any reference to the Austrian army and, secondly, whether it was made out with reference to that contention and the effect of their co-operation. He proceeded to hold that if it is treated on the ordinary grounds of capture at sea, the Fleet at large had not established a right to share. He then considers whether the Austrian army could have claimed, and the Fleet through them, and he makes the following observations: "To say that all these services are to be combined in one general co-operation, would be to establish a principle of unity in conjunct operations, of a very large scale, and far beyond what the Court is warranted to do by the authority of any case that has yet been determined. It is said, 'that the Austrian forces were instrumental in driving away the garrison from the forts by which the ships had been protected, and that the capture could not have been made by the English ships alone, without the operation of the Austrian army.' That I think would not be decisive to support an interest. In the case of a Russian army, which I have already suggested, the movements of the army, though without reference to that effect, might tend eventually to the success of an attack of ships on the coasts, though the movements were taken only for the accommodation of their own plans; yet, on such a remote and accidental assistance, it

would, I think, be difficult to construct a claim of joint interest, on the principle of co-operation and conjunct expedition."

Probably on the whole most assistance is to be got from *The Banda and Kirwee Booty*. (1) Dr. Lushington in his very elaborate and valuable judgment in that case reviewed a great number of authorities naval and military, and from the general trend of those cases and from his own conclusions it is not difficult, in my opinion, to extract sufficient guidance to enable this Tribunal to decide upon the present application. The actual captors of the treasure which was found in the two towns of Banda and Kirwee when they were recovered from the rebels in April and June, 1858, were the force formed from the Madras army, and proceeding under the command of General Sir George Whitlock, but claims were put in on behalf of several other forces which were engaged in a combined expedition for clearing the rebels out of that part of Central India. As General Whitlock's force moved from the limits of the Madras Presidency northwards to operate in Bundelcund, the force under Sir Hugh Rose, advancing from the Bombay Presidency, was striking towards the Jumna, in the end moving almost parallel with the force under General Whitlock, while in the delta of the Doab on the north side of the Jumna river, a force under General Carthew, called the Futteypore movable column, was occupied in patrolling the left bank. There were several claims in respect of other forces of detachments, but the case of the force under Sir Hugh Rose is that which most nearly approaches the present claim, and Dr. Lushington disallowed it. After speaking of the admission in certain cases of a claim of joint capture, Dr. Lushington proceeded to observe: "But the Prize Court has again and again asserted its resolution not to extend the operation of that doctrine;" and dealing with cases of booty he said: "I am not aware of any instance in which troops have been admitted to share as joint captors, solely on the ground of association irrespective of co-operation, irrespective, that is, of service actually rendered. As to the question of association in that particular case, he

(1) L. R. 1 A. & E. 109, 181.

1920

THE FELD-MARSCHALL.

Lord Phillimore.

found that the two Generals, Sir Hugh Rose and Sir George Whitlock, held co-ordinate commands—and in the case before us, General Smuts and Admiral Charlton had co-ordinate commands—and that though both received instruction from a common political officer, and though it was a common enterprise, still this did not constitute military association. He then proceeded to deal with the question of co-operation, and he concluded that in a certain sense Sir Hugh Rose assisted General Whitlock, but he found that, as far as regards the capture of Banda, the principal services rendered by Sir Hugh Rose were so long before in point of time and so far away in point of place as to be too remote to be considered: that no doubt as Sir Hugh Rose continued to advance, he gave support to General Whitlock, but that this support was of a kind which one division gives to another, and was insufficient to support a claim to share in booty. He went so far as to say that it was "certain that on more than one occasion Sir Hugh Rose diverted the enemy from General Whitlock," and even so he rejected the claim preferred by Sir Hugh Rose and his force to share as joint captors.

In the case before the Tribunal there can be no question that at any rate any time after the capture of Bagamoyo the squadron could have bombarded Dar-es-Salaam so as to make it untenable, or have landed forces under cover of a bombardment, which would have occupied the town and harbour and taken possession of the *Feldmarschall*. Their guns would have outranged any that the Germans had at Dar-es-Salaam. All that can be said as to this stage of the proceedings is that possibly if the enemy had not been pressed all along the line by the military forces they might have sent larger forces to try and hold the town. It is then suggested that though they could take possession they would not have been able to hold it if the forces under General von Lettow had not been otherwise employed; that he could have sent troops down by rail and turned the bluejackets and marines out. It is a possible supposition, but the object of capture is perhaps not so much the acquiring of booty as the destruction of the enemy's resources, and though the

Feldmarschall could not have been worked out of port because her engines were disabled, and though the bluejackets and marines might have been driven out of the town and harbour by superior forces, they would have had ample time and opportunity to insert explosives into the ship and destroy her.

I think that the claim put forward on behalf of the Army to share as joint captors is not established.

If the Tribunal comes to this conclusion upon the particular facts of the case, it becomes unnecessary to decide what would have been the legal consequences if it arrived at a different conclusion and determined in favour of the contention that the land forces had made out a claim as joint captors. But as it seems not improbable that prizes taken in some other locality during the Great War may be determined to have been taken in such circumstances that military and naval forces are to be deemed joint captors, and as the matter has been present to our minds from an early stage of the sittings of the Tribunal; was the subject of preliminary discussion in the Duala cases; and has been carefully argued in the present case, I think it expedient to state the conclusions of law to which we have come, and which will regulate the application of any prize money in such a case of joint capture.

The authority to which reference is always made is *The Hoogskarpel*, already mentioned. The grant of prize in the war then raging was made by statute (21 Geo. 3, c. 15). Sect. 1 of that Act, after reciting the Order in Council of December 20, 1780, ordering general reprisals against the States General of the United Provinces, enacted that the officers and seamen of every one of His Majesty's ships should have the sole interest and property in every ship which they should take during the continuance of hostilities after the same should have been finally adjudged lawful prize. Commodore George Johnstone and Major-General Meadows were appointed respectively Commanders-in-Chief of the squadron and of the land forces to be employed at the Cape, and they received instructions that in order to prevent disputes concerning the distribution of such booty as should be gained

1920

THE FELD-MARSCHALL.

Lord Phillimore.

by their joint operations, the booty was to be divided between the land and sea forces into two shares according to the numbers mustered in each service. When *The Hoogskarpel* came before the Prize Court, Sir J. Marriott, then Judge of the High Court of Admiralty, first condemned the ship and cargo as prize, reserving the question who were the captors, and later, on May 28, 1785, pronounced "'for the interest of the Army' agreeably to the spirit of His Majesty's Instructions, to be distributed according to the Directions of His Majesty's Instructions."

Thereupon an appeal was preferred to the Lords Commissioners of Prize on behalf of Commodore Johnstone and the rest of the Fleet, their contention being that the Act of Parliament had given this prize to the Navy, and that His Majesty's subsequent instructions could not overrule the Act of Parliament. From the proceedings on the appeal, the papers of which we have seen, it would appear that it occurred to the Lords Commissioners that possibly neither party had a claim of right to the prize. They accordingly directed the law officers to appear before them to represent the interest of the Crown, and ultimately decided that as it was a case of joint capture it did not fall within the then Prize Act, but was a reserved droit of the Crown, and that neither the land nor the sea forces had made out any title; and they varied the decree of the Prize Court by condemning the prize to the Crown. According to the statement in Mr. Rothery's book on Prize Droits, at p. 25, Commodore Johnstone and the Fleet took various steps to get this decision set aside, and failed; and the Crown, having then asserted its right, proceeded to divide the prize as a matter of bounty in the way indicated in the King's instructions to the Commanders-in-Chief.

Mr. Rothery treats this decision as laying down a general rule that where there is joint capture by land and sea forces the case is one of the reserved droits of the Crown. We have to consider whether this is not too wide an inference. Subsequent prize acts made special provision for such cases of joint capture and for the distribution of the prize money. The last statutory provision upon the subject

is 27 & 28 Vict. c. 25, s. 34, which provides that ships and goods taken by naval and military forces conjointly become subject to the jurisdiction of the Prize Court, and may be condemned as prize, but gives no indication as to how the proceeds should be distributed. It was not easy at first to discover upon what principle the Lords Commissioners arrived at the conclusion to which they came in *The Hoogskarpel.* If a vessel is captured by any public servant, such as a master of a revenue cutter, or a custom-house officer, or a police officer, it counts as a capture by a non-commissioned captor. We have had occasion in the course of the sittings of this Tribunal so to decide in *The Belgia* (1) and *The Hertha.* (2) In *The Rebeckah* (3) Sir William Scott expressed himself as follows upon the question of a capture by the armed land forces of the Crown: "Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that would be a droit of Admiralty, and the garrison must be content to take a reward from the bounty of the Admiralty, and not a prize-interest under the King's Proclamation. All title to sea-prize must be derived from commissions under the Admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take upon that element for their own benefit."

To pursue the matter further. If there be a joint capture by a commissioned and a non-commissioned ship, and the same principle would seem to apply if instead of a non-commissioned ship we read: "a for this purpose non-commissioned force," the authorities show that the prize is divided; part is a droit of the Crown, and part is a droit of Admiralty; and for the purposes of division the proportions are taken as if it was an ordinary case of joint captors; and then that portion which would go to the non-commissioned

(1) [1919] P. 41, 56. (2) Unreported.
(3) 1 C. Rob. 227, 235.

1920

THE FELD-MARSCHALL.

Lord Phillimore.

captors is treated as a droit of Admiralty. This was decided by the Lords Commissioners in *The Twee Gesuster* (1), and by the judge of the Prize Court in *Le Franc* (2), both reported in a note to *The Cape of Good Hope*. In the first case two armed cutters, one being commissioned and the other non-commissioned, took the vessel, and the Lords Commissioners so decided. In the second case six private ships of war, five of which had letters of marque, and the sixth of which was non-commissioned, took a prize, and the share which would have fallen to the non-commissioned vessel was declared to be a droit and perquisite of Admiralty. From this it would seem to follow that upon general principles, if a prize is the result of joint capture by land and sea forces, the proceeds should be divided, and that part which would be appropriate to the land forces should be determined to be a droit of Admiralty and fall as such to the Exchequer to be dealt with thereafter by the Crown as it might be advised, and the rest go to the Navy.

Bearing this in mind, we have to revert to *The Hoogskarpel*. The practice of the Lords Commissioners differed from that of the Delegates in ordinary appeals from the Admiralty or Ecclesiastical Courts, in that they gave reasons like other judges for their opinions. We have quoted the judgment delivered by Sir William Grant on their behalf in the case reported in 1 Acton. But there is no account in any law report of the reasons for the decision in *The Hoogskarpel*. A search, however, has been made at our request, and it appears that there is a short report in newspapers of the day. The Keeper of Printed Books in the British Museum has furnished the Tribunal with a paragraph which he certifies to have appeared in the same form in the *London Chronicle*, the *General Evening Post*, the *Whitehall Evening Post* and the *Morning Chronicle* in issues of various dates from June 29 to July 4, 1786, and the paragraph is as follows: "A very curious and interesting cause was yesterday determined in the Cockpit by an appeal to the Lords of the Council from the Court of Admiralty. The question related

(1) 2 C. Rob. 284n. (2) 2 C. Rob. 285n.

1920

THE FELD-MARSCHALL.

Lord Phillimore.

to the prize or capture made by Commodore Johnstone last war. It was, whether the capture was prize or booty and consequently whether the property then taken by the fleet and land forces under his command came within the Prize Act. As the destination of the armament was against the Cape of Good Hope, and as a considerable land force under the command of General Meadows was aboard, and shared in the action; their Lordships determined that the case in question did not come within the Prize Act. The consequence is, that the whole property is claimed by the Crown, and the captors must relinquish their hopes of prize money, and depend on the royal bounty for whatever compensation his Majesty may think proper or competent."

In *La Bellone* (1), Sir William Scott, who was one of the counsel in *The Hoogskarpel*, introduces an account of that case into his judgment. His statement of the reasons of the Lords Commissioners is as follows: "They laid it down that conjunct expeditions were entirely out of the statute with respect to both the services; and that the whole property captured was at the disposition of the Crown, whose equity and liberality in justly estimating the merits of both could not be doubted. The same arguments were urged then as have, with great propriety, and with great ability, been urged now—such as that the co-operation of the army could not divest the title of the navy; that their interests were still preserved; for that they were takers in a sufficient degree to answer the descriptive terms employed in the statute. But these arguments were urged in vain; the property was condemned to the Crown."

This seems to explain the decision. Speaking respectfully, one may say that it was a rather narrow construction, but it may be put in this way. The Fleet, asserting a claim under the statute in contravention of the instructions given by the Crown, must be confined to the literal construction of the statute; they may have their pound of flesh, but no more. We, the Lords Commissioners, construe the statute as being that if you are the only takers you may have the prize, but

(1) 2 Dods. 343, 351.

1920

THE FELD-MARSCHALL.

Lord Phillimore.

if you and others are the takers you do not come within the statute. If this be the ratio decidendi then for us, to whom that particular prize Act does not apply, the matter is to be decided upon general principles of law ; and our view is that if a case of joint capture should, at any time, be proved before us, that part which ought to be appropriated to the Navy will be a droit of the Crown ; but that part which ought to be appropriated to the Army will be a droit of the Admiralty, and, therefore, not a droit of the Crown, and, therefore, will not be directed by us to be paid to the Naval Prize Fund. What the Crown may be pleased to do with the part which falls to the Exchequer as a droit of Admiralty it is not for us to say.

Before we part with this matter we should perhaps observe that if the apparent inclination of Mr. Rothery's view was right, and that as a general rule of law apart from the construction of the particular statute a joint capture always became a reserved droit of the Crown, it might then be argued that under the Naval Prize Act which gives us our authority, the whole would, notwithstanding the fact that it was a joint capture, accrue to the Navy. It might be said that if it be a droit of the Crown of any sort it should go to the Naval Prize Fund, because the schedule speaks of any money being droits of the Crown, with no limitation upon those words, and this might be sufficient to cover reserved droits as well as those usually granted to the Navy.

ADMIRAL OF THE FLEET SIR GEORGE CALLAGHAN. I concur in the judgment of Lord Phillimore.

It seems clear that the *Feldmarschall* was not a joint capture although the capture was the result of joint operations. The Navy took possession of the ship four or five hours before the arrival of the land forces. These forces were not in sight at the time of capture. In old days only those actually in sight at the time could claim a share in capture, and I take it the same principle would apply in this case.

SIR GUY FLEETWOOD WILSON. The case of the *Feldmarschall* was brought before the tribunal as a test case in

1920

THE FELD-MARSCHALL.

Sir Guy Fleetwood Wilson.

which to obtain a decision upon the right of the Army to share in the proceeds of sale of a prize captured as a result of joint operations by the Army and Navy. It raised questions of fact and of law. The question of fact was whether the vessel was a joint capture made as the result of the joint operations of the two services in circumstances which, if there were no legal impediment, would entitle the Army to share. The question of law was whether this vessel was a droit of the Crown, and if so whether the effect of the Naval Prize Act, 1918, and the Proclamation made thereunder on August 15, 1918, whereby droits of the Crown were granted to the Fleet, was to cede this vessel to the Fleet so as to deprive the Exchequer of the right hitherto reserved by Prize Acts of granting the proceeds of the sale of joint captures to the Army and Navy. The alternative proposition of law was that in so far as the naval forces contributed to the capture the proceeds of sale were the droits of the Crown, but in so far as the land forces contributed to the capture the proceeds of sale were a droit of Admiralty.

I agree in the judgment of Lord Phillimore in so far as the questions of law are concerned and I do not desire to add anything to his observations upon these matters. I regret, however, that I do not find myself in agreement with the conclusion reached by him and Admiral Callaghan upon the question of fact.

Evidence was given before the tribunal by Admiral Charlton on behalf of the Navy and by Lieut.-Colonel Grant, D.S.O., on behalf of the Army. Admiral Charlton was senior naval officer in command of the Cape station and was present at the surrender of Dar-es-Salaam in his flagship, the *Challenger*. Lieut.-Colonel Grant was second senior officer on the staff of General Smuts, who was in supreme command of the naval and military forces operating against German East Africa. Both officers were therefore fully acquainted with the scope and intention of the operations. A map was produced based upon the evidence given by Colonel Grant, which illustrated the advance of the columns under General Smuts which were operating against the line of the central railway of which

1920

THE FELD-MARSCHALL.

Sir Guy Fleetwood Wilson.

Dar-es-Salaam is the terminus of the sea-end. General Smuts was advancing from the north through Handeni to Morogoro. General van Deventer was advancing in a south-easterly direction through Mpapwa against Kilosa. Morogoro and Kilosa are on the railway.

In conjunction with these main movements a subsidiary movement had been initiated, parallel to the main operations, to clear the coastal area and capture the lower part of the central railway and Dar-es-Salaam. The operations to clear the coastal area were in the general charge of General Edwards, Inspector-General of Communications, and Admiral Charlton, the naval Commander-in-Chief, jointly. The command of the land columns was entrusted to Colonel Price, whose headquarters we were told were in Admiral Charlton's flagship. The scheme of operations for which these two officers were jointly responsible must have been preconceived in the closest collaboration and provision made for its execution from a common fund of initiative and skill. That reliance was placed on both land and sea forces is established by the record of the progress of the operations.

The column moving against Bagamoyo reached Mandera on August 15 or 16, the object being to effect the joint naval and military attack on that place. Before the arrival of the column however, within striking distance of the town, the Navy undertook, singlehanded, the capture of Bagamoyo, which was successfully effected on August 15. At the same time a column was advancing down the coast from Sadani, and on August 15 was south of the Wami river. On August 21, 1916, van Deventer reached Kilosa and cut the railway. On August 26, 1916, General Smuts occupied Morogoro. A column had been detached from Colonel Price's forces at Bagamoyo to occupy the Ruvu bridge. The effect of these successful operations against the railway was that the German commander, von Lettow, was no longer able to reinforce Dar-es-Salaam and the evacuation of the town by the garrison was at once commenced. Admiral Charlton stated in his evidence that on September 4, the date on which the town was occupied, he was informed by the

1920

THE FELD-MARSCHALL.

Sir Guy Fleetwood Wilson.

residents who remained that the evacuation had begun a fortnight earlier. This approximately coincides with the cutting of the railway at Kilosa by van Deventer and with the imminent occupation of Morogoro by General Smuts.

At the beginning of September the occupation of Dar-es-Salaam was decided on. The town was defended by fortifications which were armed with one 6-inch gun and two or three 4.1 guns. The latter guns were naval guns removed from the cruiser *Königsberg* and temporarily mounted in the forts. The sailors from the *Königsberg* were assisting in the defence of the town. On September 3 the Navy bombarded the fortifications surrounding the town for the purpose of drawing fire and ascertaining whether the place was still defended. On September 4 the demand for surrender was sent in, signed by Admiral Charlton and Colonel Price, and the town was surrendered about 10.30 A.M., the naval forces entering two or three hours later after the obstructions in the harbour had been cleared. A boarding party was put on board the *Feldmarschall* at about 2.30 P.M. The column at Bagamoyo had started for Dar-es-Salaam two days before. The distance to be covered was about thirty-five miles through a hot and dry country which rendered it necessary to march by night. By September 4, the day on which Dar-es-Salaam surrendered, the column was resting outside the town and entered two or three hours after the naval forces had entered the port.

Admiral Charlton in his evidence submitted that the naval forces could have compelled the surrender of the town on August 23, 1916, and stated that he had in fact prepared a form of surrender. I do not think that this is the relevant consideration, for, in the conduct of warlike operations, the interest of one service as against that of another or of an ally must of necessity be subordinated to the general scheme of operations, and it is not proper to take into account possibilities, the success of which at best must be a matter of speculation, especially in so hazardous an attempt as a cutting-out expedition, in a port which could be readily reinforced by the enemy. Moreover, in my opinion there would not be

1920

THE FELD-MARSCHALL.

Sir Guy Fleetwood Wilson.

an effective capture if the vessel were in the possession of captors for a period of time only sufficiently long to permit of her disablement and destruction and were then abandoned and retaken by the enemy. No argument in favour of the Fleet can be based on the seizure of a prize which is afterwards abandoned and recaptured by the enemy.

On September 4, 1916, when Dar-es-Salaam surrendered, the position was that the town had been rendered untenable by reason of the advance of General Smuts and General van Deventer's forces across the railway. It is true that the operations of these forces which were strategically decisive in compelling the evacuation of Dar-es-Salaam were being carried on at a considerable distance from the sea and it may be a matter of doubt whether there can be said to have been that degree of co-operation between them and the Fleet which, in *The Stella del Norte* (1), to which Lord Phillimore refers, is laid down as the test of the right of the Army to share. Each case must be decided upon its own facts, and it is material to remember that little assistance can be obtained from the precedents of old wars because the modern developments of transport and communication by railways, aircraft, telegraphs and wireless telegraphy render co-operation between distant forces much closer and more real than was possible in former times when these facilities were not at their disposal.

In the present case, however, the surrender of Dar-es-Salaam was as much due to the advance of Colonel Price's forces along the coast as to the immediate attack by the Navy. Admiral Charlton agreed that it was a joint operation, and stated that he did not think the town would have entirely surrendered without a good deal more fighting unless the military had been there. Moreover, two telegrams sent by Admiral Charlton to the Admiralty reporting the surrender of Dar-es-Salaam were put in evidence before us and read as follows: "From C.-in-C. Cape Zanzibar. To Admiralty. 4th September, 1916. Dar-es-Salaam surrendered 9 A.M. 4th September to combined naval and military forces which

(1) 5 C. Rob. 349.

1920

THE FELD-MARSCHALL.

Sir Guy Fleetwood Wilson.

are now taking possession." "Naval C.-in-C. Cape, to Admiralty, 5th September, 1916. Dar-es-Salaam surrendered on 4th September on demand by *Challenger* following close attack by whalers at daylight on 3rd September, and subsequent heavy bombardment by ships of gun-positions north of town in advance of troops moving south from Bagamoyo, these being strongly reinforced by landings at Konduchi and Maassani. After surrender Colonel Price, O.C., landed with seamen (———) and British colours were hoisted with full honours in the presence of troops entering the town from northward. . . . ."

I think these telegrams fairly represent the view taken at the time by the naval Commander-in-Chief, who did not in his evidence seriously dispute that the surrender of the town was due to the combined operations of the naval and military forces.

Whether the forces under General Smuts and General van Deventer are entitled to claim is, as I have already stated, a question upon which I feel considerable doubt, but having considered *The Stella del Norte* (1) and *The Banda and Kirwee Booty* (2), I am disposed to think that they are not so entitled. The naval and military operations were conducted with a common purpose and under the general directions of a common chief, General Smuts, and there was undoubtedly co-operation which materially assisted the forces operating in the coastal area and at sea in their task of occupying the town of Dar-es-Salaam by rendering it strategically untenable by the enemy. According to the cases cited, however, this is not sufficient to entitle these land forces to share, and as I do not think there can be said to have been that "service actually rendered" which is a necessary element of their claim, the numerical strength of these forces should not be taken into account.

It is, however, clear that at the time the demand for surrender was made the military force was encamped immediately outside the town waiting for the cool of the day to take part in the attack if the demand was not complied with. I have

(1) 5 C. Rob. 349. (2) L. R. 1 A. & E. 109.

1920

THE FELD-MARSCHALL.

Sir Guy Fleetwood Wilson.

examined *The Dordrecht* (1). I am satisfied that the operations against the town were conducted upon a preconcerted plan devised by General Headquarters and carried into effect by Admiral Charlton and Colonel Price acting in collaboration in the flagship with the naval and military forces under their commands, and that the land forces rendered not only very material but essential service in securing the surrender of the town without very considerable loss of life. There was a contribution of actual assistance by the land forces as well as a preconcerted plan and, in my opinion therefore, the facts fall fairly within the principles laid down in *The Dordrecht* (1) and are such as to entitle the force operating along the coast to put forward a claim to share in the proceeds of this vessel.

Solicitor for the Exchequer and Army and for the Naval Forces: *The Treasury Solicitor.*

E. C. T.

1920

May 3, 19.

[DIVORCE.]

FYFFE *v.* FYFFE.

Divorce—Practice—Permanent Maintenance—Variation of Settlement—Leave to present Petition out of Time—Application to Judge—Jurisdiction of Registrar—Divorce Rules 95, 121, 122, 181.

When leave has once been given under Divorce Rule 95 to file a petition for permanent maintenance, or *semble* for variation of a settlement, after one month has expired from the date of the decree absolute, the petitioner is absolutely entitled to have the petition heard. As the respondent to the petition is therefore precluded by leave being given from objecting to the petition being heard, an application for leave made without consent ought to be made to the judge only.

The question as to the jurisdiction of the registrar to make such an order was not decided, because the husband had appeared to the petition and taken further steps without objecting to the jurisdiction.

A DECREE NISI for dissolution of marriage was pronounced on the wife's petition on May 31, 1918, and made absolute

(1) 2 C. Rob. 55.

1920

FYFFE v. FYFFE.

on February 3, 1919. On March 4, 1920, the petitioner took out a summons calling on the husband to show cause why she should not be at liberty to file a petition for permanent maintenance, and asking that the time for so doing might be extended. The summons was not served on the husband, and he had no notice of it. The registrar, however, made an order on March 9 that the wife should be at liberty to file a petition within fourteen days. The petition was filed on March 16, and served on the husband on March 24. He appeared on March 26, and twice obtained by consent, or by order of the Court, further time for putting in an answer. On April 14, while the time so obtained was still pending, the husband took out this summons for leave to appeal against the order made in chambers, giving the wife leave to file her petition. The ground for this application was that the registrar had no jurisdiction to make the order, for which the application should have been made to the judge, and that leave had been given more than twelve months after decree absolute.

This summons was adjourned into Court for argument on May 3.

Noel Middleton for the summons. There are two objections to the order giving leave to the wife to file her petition for permanent maintenance a year after the decree absolute. The first is that the registrar had no jurisdiction to make the order. The case depends on the Divorce Rule 95, which provides that leave to proceed after one month must be given by the judge. That is the only rule where the word "Judge" is used alone. Rule 181 gives the registrars power to hear summonses usually heard by the "Judge Ordinary," which is the expression used in Rules 121 and 122, but none of these three rules apply to summonses under Rule 95, which this is.

The second ground is that the Court will never grant leave to file such a petition more than twelve months after a decree absolute: *Robertson* v. *Robertson* (1); *Yglesias* v. *Yglesias*. (2) In *Suart* v. *Suart* (3) the application was made by consent.

(1) (1883) 8 P. D. 94. (2) (1879) 4 P. D. 71.
(3) [1910] P. 246.

1920

FYFFE v. FYFFE.

T. Bucknill for the petitioner. No distinction can be drawn between the phrases "Judge" and "Judge Ordinary." They mean the same thing. None of the cases lay down any final rule as to time. The Court has an absolute discretion to be exercised according to the circumstances of each case, and Rule 181 enables the registrars to exercise that discretion. (1)

Cur. adv. vult.

May 19. SIR HENRY DUKE P. This is the application of David Mitchell Fyffe, whom I will call the husband, for leave to appeal against an order made in the registry whereby leave was given to his late wife, Martha Beatrice Fyffe, whom I will call the wife, to file a petition against him for maintenance. [His Lordship stated the facts of the case as above, and proceeded :] The husband's present application was based upon a contention that the leave given in the registry for filing the wife's petition for maintenance was made without jurisdiction. The order for maintenance after dissolution of marriage

(1) Note : The Divorce Rules upon which the question turned, are as follows :—

95. "Applications to the Court to exercise the authority given by ss. 32 and 45 of 20 & 21 Vict. c. 85, and by s. 5 of 22 & 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter."

121. "The Judge Ordinary shall in every case in which a time is fixed by these rules and regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit."

122. "To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in Chambers."

181. "All summonses heretofore heard by the Registrars of the principal registry of the Court of Probate in the absence of the Judge Ordinary shall hereafter be heard before one or more of the Registrars at the principal registry of that Court during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence."

which was provided for by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32, and is now provided for by the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1, is an order which may be made "on any decree for dissolution." The direction in Rule 95 of the Divorce Rules, published in 1865, that the petition in these cases shall be filed "as soon as by the said statutes such applications can be made, or within one month thereafter," does not determine the time at which applications can first be made. The decision in *Bradley* v. *Bradley* (1) makes it clear, however, that an application made within a month of the decree absolute is made in good time. What was objected on the applicant's part to the extension of time made in the registry, was that under Rule 95 power to extend the time for application is capable of being exercised only by the judge. On this construction of Rule 95, and of Rules 121, 122 and 181, which also have a bearing on the matter, there is a good deal to be said for the applicant's contention. For many years, however, and certainly since 1908, Rule 181 has been taken to include cases under Rule 95, and no practical inconvenience has resulted. It is noteworthy, though, that in *Nicolas* v. *Nicolas* (2) the Court of Appeal considered the effect of an order made in the registry in accordance with recent practice in this respect, and decided that a petition lodged after delay of many years, but filed by leave and proceeded with under Rule 101, could not be dismissed by the registrar on grounds of delay, but must be reported upon in due course. Eve J. (3) pointed out that "if leave to present the petition is obtained, the applicant is entitled ex debitio justitiæ to have it heard and adjudicated upon." In view of this decision as to the conclusive effect of leave to file a petition, it is advisable that an application made without consent to file a petition for maintenance or for variation of settlements, after the expiration of the time limited by the rules, should be made to a judge.

It is unnecessary in the present case to determine the question

(1) (1878) 3 P. D. 47.
(2) [1919] W. N. 267; 89 L. J. (P.) 95.
(3) [1919] W. N. 268; 89 L. J. (P.) 96.

1920

FYFFE v. FYFFE.

The President.

of practice which is raised by the applicant. With knowledge of all the material facts, he accepted service of the petition, entered an appearance, and obtained from the Court and from his opponent time to answer. He is therefore too late to take advantage of this objection in point of procedure which he now makes. Moreover the facts of the case are such that the wife's time for making her application ought to be extended, and may be taken now to be extended.

The application is dismissed with costs.

Solicitors for summons : *Cunliffe, Blake & Mossman.*
Solicitors for petitioner : *Lumley & Lumley.*

J. R. B.

1920

Jan. 22, 23 ; *Feb.* 18 ; *Mar.* 24.

[ADMIRALTY.]

THE KARAMEA.

(1919, fol. 140.)

Admiralty—Collision—Navigation of Entrance to Montevideo Harbour—Rounding the Whistling Buoy—"Keep course and speed"—Regulations for Preventing Collisions at Sea, arts. 19, 21 *and* 27.

The defendants' steamship *K.*, outward bound from Montevideo, when approaching the whistling buoy off the entrance to Montevideo Harbour, sighted on her port bow the plaintiffs' steamship *H.*, inward bound, and recognized that the vessels were on crossing courses. Under art. 19 of the Sea Regulations, therefore, it was the duty of the *H.* to keep out of the way, and, under art. 21, the duty of the *K.* to keep her course and speed. When she had the whistling buoy abeam on the starboard hand the *K.* starboarded to make the outward turn in the channel leading to the sea. The two vessels came into collision:—

Held, that, although when no action has to be taken for any other vessel, the buoy might be a convenient point at which to make the turn, there were no "special circumstances" (art. 27) which relieved the vessels on sighting each other from obeying the crossing rule, or which entitled the *K.* to say that in starboarding at the buoy she was in fact "keeping her course" round the bend in the channel.

ACTION of damage by collision.

The plaintiffs were the owners of the Norwegian steamship

1920

THE KARAMEA.

Haugland; the defendants and counterclaimants were the owners of the steamship *Karamea*, of the port of Southampton.

The collision took place on the night of February 12, 1919, to the southward and eastward of the whistling buoy off the entrance channel to Montevideo.

The facts, which are fully set out in the judgment, shortly stated were that the two vessels, the *Haugland* inward bound, and the *Karamea* outward bound, were approaching the whistling buoy on crossing courses, the *Haugland* having the *Karamea* on her starboard bow. Instead of keeping her course as required by art. 21 of the Sea Regulations, the *Karamea*, when she had the whistling buoy abeam, starboarded to make the turn outwards from the channel to sea. It was contended that having regard to the bend in the channel she was justified in so doing, and that she was in fact keeping her course.

D. Stephens K.C. and *Dumas* for the plaintiffs.
Bateson K.C. and *Alfred Bucknill* for the defendants.

Cur. adv. vult.

March 24. HILL J. In this case the collision happened shortly after 10 P.M. on February 12, 1919, off Montevideo, to the southward and eastward of the whistling buoy, which lies off the entrance channel to Montevideo. It was a fine clear night. The *Haugland*, a steamship of 3194 tons gross and 324 ft. long, in ballast, was inward bound, and the *Karamea*, a steamship of 5627 tons gross and 420 ft. long, laden, was outward bound. The ships were in collision, the port side amidships of the *Haugland* with the stem of the *Karamea*. When they first sighted one another the speed of the *Haugland* was about 8¾ knots. The speed of the *Karamea* was rather less. Her engines were at full speed, but she was of deeper draught and passing through mud.

At the time of the collision the *Haugland* was under hard-a-port helm with engines at full speed ahead; and the *Karamea* was under hard-a-starboard helm, with engines at full speed astern. Before this, according to the plaintiffs, the ships had

1920

THE KARAMEA.

Hill J.

been brought red to red, and, according to the defendants, they had been brought green to green.

The plaintiffs' case, as made, is that the *Haugland*, on a W. ½ N. course, saw the masthead light, and with glasses, the red light of the *Karamea* to the northward of the whistling buoy, 3 to 4 points on the starboard bow at an estimated distance of 2 or 2½ miles; that the *Haugland* ported 3½ points to a course of N.W. and brought the buoy nearly ahead and the *Karamea* a little on the starboard bow; that the *Karamea*, still showing her red light, crossed the bows of the *Haugland* from starboard to port at a distance of ¾ of a mile to a mile and brought the vessels red to red and so continued, until, at about ½ mile, the *Karamea's* red light was 2½ to 3 points on the *Haugland's* port bow; that the *Haugland* then starboarded a little to bring the buoy a little on the starboard bow; that then, at a distance of ¼ of a mile, the *Karamea* opened her green light about 2 points on the *Haugland's* port bow; that the *Haugland* hard-a-ported, keeping full speed ahead, heard two short blasts and replied with one short blast; that the red light of the *Karamea* was shut in and the collision followed.

The defendant's case, as made, is that the *Karamea* was on a S. by E. course, shaping to pass the whistling buoy close on the starboard hand, and making a speed of 7 knots; that when about ¾ of a mile above the buoy she saw the masthead light of the *Haugland* 3 points on the port bow at an estimated distance of 1½ to 2 miles, and, though seeing no green light, recognized that the *Haugland* was a steamer approaching and heading up channel—i.e., on a crossing course; that when the buoy was abeam on the starboard hand, the *Karamea* starboarded, and after beginning to swing saw the green light of the *Haugland* about a point on the port bow; that she gave two short blasts and hard-a-starboarded and brought the green light about ahead; that she gave a second two short blasts and then the red light of the *Haugland* opened 1 point on the starboard bow at a distance of about ¼ of a mile; that she went full speed astern, heard one short blast, and the collision followed. As to helm action there is some

1920

THE KARAMEA.

Hill J.

variation in the evidence. The master says the orders were starboard and then hard-a-starboard; the man at the wheel says it was hard-a-starboard from the beginning.

The first question in the case is: Did the crossing rule apply, and, if it did, was it obeyed? The *Haugland*, bound for Montevideo from the sea, was minded to pass the buoy on the starboard hand and then turn in under port helm. The *Karamea*, bound from Montevideo for the sea, was minded to pass the buoy on the starboard hand and at the buoy to turn out under starboard helm. The *Haugland*, while still a good distance away from the buoy, which was on the *Haugland's* starboard bow, saw the red light of the *Karamea* broader on the starboard bow and saw that the *Karamea* was coming down towards the buoy—that is, to the southward. The *Karamea*, while still to the northward of the buoy and a good distance away from the *Haugland*, saw the masthead light of the *Haugland*, and recognized that the *Haugland* was heading to the westward.

There was a good deal of evidence and discussion as to whether the *Haugland's* green light was an efficient light. It is immaterial on the question of liability, for the *Karamea* without the guidance of the light knew that the *Haugland* was heading to the westward. The ships were, in fact, crossing ships, and each knew it. If the rules applied, the *Haugland* was the give-way ship and the *Karamea* was the keep-course-and-speed ship. I am advised, and I am myself of opinion, that there was nothing which made the crossing rules inapplicable, or which could justify the *Karamea* in changing her course at the buoy, or which could justify the *Haugland* in not taking timely and sufficient measures to keep clear of the *Karamea* and pass under her stern. When no other ship is in question, the buoy may be a convenient point at which to make the turn, but, according to the evidence, the turn is often made before the buoy is reached, and I am advised that there is no reason why it should not be made after the buoy is passed. The Elder Brethren can see, and I can find, no special circumstances which relieved the ships, on sighting one another, from obeying the crossing rules or which can entitle the

1920

THE KARAMEA.

Hill J.

Karamea to say that in starboarding at the buoy she was keeping her course. I therefore apply the crossing rules.

Applying the crossing rules, it is obvious that the *Karamea* was to blame for starboarding, and that that fault was a cause of the collision. She saw the *Haugland* approaching on the port bow, and when abreast of the buoy she starboarded. According to the evidence, she answered her helm slowly; she was dragging in the mud. I am advised that it is very likely that she would get across on to the *Haugland's* port bow before she had swung sufficiently to open her green light. I find that that is what happened. I find that the ships were never green to green. The lights were the green of the *Haugland* to the red of the *Karamea*, then red to red, and at the last the red of the *Haugland* to the green of the *Karamea*. The *Karamea* is to blame for starboarding and continuing to starboard. Her starboarding was wrong and brought about a position of danger. She never turned that into a position of safety by bringing the vessels green to green. She continued to starboard while the *Haugland* rightly ported, and she so brought about the collision.

I now have to consider the conduct of the *Haugland*. Accepting the plaintiff's case in full, it is impossible to acquit the *Haugland* of blame. When the green light of the *Karamea* opened on the *Haugland's* port bow, the helm of the *Haugland* was hard-a-ported, but the engines were kept full ahead, instead of being put full speed astern. This was all the more wrong because the officer in charge of the *Haugland* had observed that the *Karamea* was starboarding before the *Karamea* opened her green light. He then knew that the *Karamea* was intentionally taking action which, if persisted in, would create a position of great danger, and when the green light opened he knew that a position of great danger had been created. I am advised that he ought to have at once reversed, and I entirely agree.

There still remains the question of whether the *Haugland* committed any earlier or other fault.

[His Lordship dealt with the evidence on these points, on which he found in favour of the *Haugland*, and continued:]

1920

THE KARAMEA.

Hill J.

The main fault for the collision rests with the *Karamea*. The *Haugland* is also to blame; her blame is in not reversing when a position of danger was brought about by the *Karamea*.

In these circumstances, it seems to me that the proportions of blame are not the same, and I pronounce the *Karamea* three-fourths to blame, and the *Haugland* one-fourth to blame.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*

Solicitors for the defendants: *Ince, Colt, Ince & Roscoe.*

E. C. T.

[ADMIRALTY.]

(IN PRIZE.)

1920

Apr. 15, 16, 28.

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

[1915, Nos. 405, 432 and 395.]

Prize Court—Contraband Cargoes—Ships on Time Charter—Knowledge of the Charterers and Masters—Condemnation of Ships.

Three Norwegian steamships were chartered in 1912 and 1913 to the Gans Steamship Line, an American Corporation, for periods of nine and ten years. After the outbreak of war with Germany the Gans Line loaded the vessels with foodstuffs consigned to Copenhagen, and a large proportion of each of the cargoes was subsequently condemned as conditional contraband destined for an enemy base of supply: [1915] P. 215. The evidence showed that the Gans Line organized the sailings to Copenhagen as a means of furnishing the German Government with supplies; that the masters of the vessels, who were appointed and paid by the owners, knew that they were engaged on a contraband transaction; and that the owners were aware that their vessels were bound to Copenhagen, a port to which they had not previously gone, and that they were carrying cargoes of foodstuffs:—

Held, that having regard to the broad facts of the whole transaction, the knowledge of the charterers, and the knowledge of the masters, the vessels were subject to condemnation.

ACTIONS, tried together, for the condemnation of three neutral steamships for carrying contraband.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

In October and November, 1914, three Norwegian steamships, the *Kim*, the *Björnstjerne Björnson* and the *Alfred Nobel*, sailed from New York bound to Copenhagen with cargoes mainly consisting of lard, fat backs and similar products shipped for the most part by Chicago meat packers. There was also on the *Kim* a small quantity of rubber falsely described as "gum." The vessels and their cargoes were seized as prize, and ultimately, after a protracted hearing, a substantial portion of each of the cargoes (over 50 per cent.) was condemned as prize as having an ultimate enemy destination to Hamburg, a German base of supply. (1)

The three ships in question had been chartered by their respective owners in 1912 and 1913 to the Gans Steamship Line for periods of nine and ten years. The Gans Line was an American Corporation, but the President, John H. Gans, was a German subject, who on the outbreak of war devoted himself to the organization and employment of the neutral shipping under his control for the belligerent purposes of Germany. A line of vessels was organized to Copenhagen to carry foodstuffs on a large scale, and amongst others, the three ships in question, which had not previously sailed to Copenhagen, were appropriated to this service.

Evidence was filed on behalf of the Norwegian owners to the effect that neither they nor their masters had any knowledge that their vessels were carrying contraband ultimately destined for Germany; that under the charterparties the vessels were only to be employed "in lawful trade"; and that all arrangements with regard to the shipping of the cargoes were made by the shippers with the Gans Line. Under these circumstances the claimants contended that the vessels were not liable to condemnation.

Sir Gordon Hewart A.-G., R. A. Wright K.C. and *J. Wylie* for the Procurator-General. A neutral vessel is liable to condemnation if she has on board contraband goods with an enemy destination constituting a substantial proportion of the whole cargo, at any rate if the owner had knowledge of the

(1) [1915] P. 215.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

character of the cargo: *The Hakan*. (1) Where ships are time-chartered for extended periods, the knowledge of the charterer is equivalent to the knowledge of the shipowner. Sir Samuel Evans said in *The Hakan* (2) that "if owners, in times of war, and in waters favourable to contraband trading, enter into time charter contracts, it would be placing premiums upon contraband trading to allow the owners to protect themselves by relying on charterparties and sheltering themselves behind a screen of ignorance of their own deliberate construction"; and the Privy Council did not dissent from this dictum.

If, on the other hand, it is to be contended that as the owners paid the masters and crews they retained a certain amount of control, then the knowledge of the masters would be equivalent to the knowledge of the owners, and it can hardly be contested that the masters must have had knowledge of the nature of the transactions in which the ships were engaged. While the owners personally may not have had direct knowledge that the cargoes were destined for Germany they knew that the ships had not been running to Copenhagen before the war and that they were being used by the Gans Line to carry cargoes of an unusual character to a port which was notoriously being used as a German base of supply. The ships were only to be employed in "lawful trade," and the owners therefore could have objected to the charterers running them in the Copenhagen service with cargoes of a contraband character, but the evidence shows that so far from objecting the owners acquiesced in the destination. The ships, therefore, are subject to condemnation.

Balloch for the shipowners. Before a ship can be condemned for the carriage of contraband there must be proof of knowledge on the part of the shipowner. Under ordinary circumstances it may be that the knowledge of the master must be taken to be the knowledge of the shipowner, but it is not sufficient that the charterer should have knowledge of the contraband transaction. The shipowners did not demise the ships or so divest themselves of control under the charters as to constitute

(1) [1918] A. C. 148. (2) [1916] P. 266, 283.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

the charterers in effect the owners. No more possession or control was given to the charterers than in many short voyage charters. Lord Sterndale in *The Ran* (1) refused to condemn a vessel carrying a small quantity of rubber falsely manifested as gum which had an enemy destination, where the vessel was chartered for a single voyage, and that decision is equally applicable to these charters.

[THE PRESIDENT. Are you not in this dilemma: either the owners divested themselves of possession and control, or the vessels were under the control of the masters who knew, according to the Crown's case, that they were engaging in contraband transactions?]

There is no evidence that the masters knew that the cargoes were destined for Germany. The vice would only come in after the goods arrived at Copenhagen, and so far as the voyages, qua the ships, were concerned, they were innocent. Even assuming that Mr. Gans may have had his suspicions that these cargoes might find their way to Germany, they were merely conditional contraband, and he could not have had the knowledge as to their military destination which would bring the case within the decision of the Privy Council in *The Hakan.* (2) As regards the rubber on the *Kim*, manifested as "gum," the question is not what persons engaged in the rubber trade would think of the description, but what a Scandinavian master would think of it: see Lord Sterndale's observations in *The Ran.* (1) [*The Hillerod* (3) was also referred to.]

Wright K.C. in reply. It was not until rubber was declared absolute contraband that it was shipped as "gum"; the earlier shipments were correctly manifested.

The evidence shows that it was the Gans Line themselves who insisted on the misdescription, and this can only have been for purposes of deception. The shipowners put their ships entirely at the disposal of the Gans Line and cannot claim immunity from the penalty attaching to the wrongful user of the ships. Further, more than 50 per cent. of the

(1) [1919] P. 317. (2) [1918] A. C. 148.
(3) [1918] A. C. 412.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

cargoes having been condemned, the owners are estopped from saying they had no knowledge of the transactions: see art. 40 of the Declaration of London. Apart from that, however, on the evidence the inference is that they had their suspicions, but preferred to make no inquiries: cf. *The Hillerod.* (1) [Reference was made to *The Dirigo.* (2)]

Cur. adv. vult.

April 28. The PRESIDENT (SIR HENRY DUKE). In these cases consolidated for trial the Crown claims condemnation of three Norwegian steamships which in November, 1914, were captured in course of the voyage from New York to Copenhagen, with cargoes mainly consisting of foodstuffs, and brought into the custody of the Marshal. Causes for condemnation of the ships and their cargoes were instituted, which, after release of the vessels on bail, came to a hearing in July and August, 1915, with the result that a large part of each of the cargoes was condemned as conditional contraband destined for delivery at an enemy base of supply. A parcel of rubber from the cargo of the *Kim*, which was described in the ship's papers as gum, was also condemned as absolute contraband shipped for an enemy destination under a false description. The President, Sir Samuel Evans, adjourned the hearing of the claims for condemnation of these ships and of another neutral steamship, the *Fridland*, which had been captured under like circumstances and which subsequently was released for reasons not now material.

At the hearing before me discussion as to the character of the several cargoes and the circumstances of the various shipments was limited to such aspects of the matter as relate to the liability of the ships to confiscation, applying to the case the principles stated by the Privy Council in *The Hakan* (3), and by this Court in two recent judgments.

Some evidence was adduced with regard to the several cargoes and the circumstances of the shipments which was

(1) [1918] A. C. 412. (2) [1919] P. 204.
(3) [1918] A. C. 148, 155.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

not before the Court at the hearing of the cause with regard to the cargoes. This included evidence as to flour and grain on board the ships, which came before Lord Sterndale in *The Dirigo* (1), and other evidence as to consignments of which release was shown in *The Alfred Nobel* (2), to have been obtained at the hearing before Sir Samuel Evans by means of a concocted case. Counsel for the Crown proved also a variety of acts on the part of the Gans Steamship Line, who were the charterers of the three ships, John H. Gans, President of that concern, the owners and masters of the ships, and the shippers of various consignments of cargo, which necessitate a reference in general terms to the case which was established.

The Crown was able to show from statements of Mr. John H. Gans and his associates, and from the nature of the transactions, that shortly after the outbreak of war Mr. Gans organized as a new undertaking a line of steamships from New York to Copenhagen for the purposes of carrying on upon a large scale a new trade organized by him chiefly in hog products, wheat and flour, and that in this trade the Gans Steamship Company engaged not only the ships in question, of each of which they were charterers for a term of years, but other neutral shipping of the same class. Mr. Gans, who died in the summer of 1915, was a German subject who had been engaged in shipping business in New York since 1900. The evidence showed him to have been from the outbreak of the war an enemy agent of formidable activity, and one of a group of such agents who were resident in New York.

The vessels here in question were all in Norwegian ownership. The *Kim* was of 5857 tons gross, registered at Tonsberg in Norway and owned by P. Johanssen of that port; the *Björnstjerne Björnson*, of 5268 tons gross, the property of a company at Bergen; the *Alfred Nobel*, of 4769 tons gross, belonging to a company at Flekkefjord. The *Kim* was chartered in May, 1912, and delivered in March, 1913; the *Björnstjerne Björnson* was chartered while building in June, 1912, and delivered in October, 1912. The charters were for terms of nine or ten years. At the outbreak of war all the

(1) [1919] P. 204. (2) [1918] P. 293.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

ships were engaged in various parts of the world in general trade, and they were directed to New York by the charterers. By each charterparty the ship named therein was agreed to be let for a term of years from the date at which she should be put at the disposal of the charterers, ready to receive cargo, and with full complement of officers and crew, and was to be so maintained during the continuation of the charterparty. She was to be "employed in carrying lawful merchandise" between all ports, with certain specified exceptions here immaterial, as the charterers or their agents should direct. The owners were to appoint the master and to provide and pay officers and crew, to pay for insurances and to maintain the ships in an effective condition. The hire was agreed at a fixed monthly rate. The master was to be under the orders of the charterers "as regards employment, agency and other arrangements," and it was provided that if the charterers shall have reason "to be dissatisfied with the conduct of the captain, officers or engineers the owner shall on receiving particulars of complaint investigate the same, and, if necessary, make a change in the appointment." The charterers were given the option of sub-letting. The charterparty of the *Björnstjerne Björnson* had as a term that the steamer should "only be employed in strictly neutral trades, contraband, blockaded ports and ports where hostilities in progress excluded."

The sailings of the new line into which the three ships were directed by Mr. Gans began on October 20, 1914. The first four vessels appropriated to the service, including these three and the *Fridland*, left New York respectively on October 20, October 27, October 28 and November 11. Some knowledge of the scale of the undertaking and the character of the arrangements is to be derived from the facts as to the consignments of meat products. These three ships carried between them meat products for four firms of meat packers, consigned to agents of the packers in Copenhagen, to the extent of upwards of 19,000,000lb. The Hamburg firm of Neumann, who had sent one of their members to New York, shipped large consignments of grain and flour. Mr. Gans organized the service and conducted personally the engagements of freight for the

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

new line and took an active part in the detail of the arrangements. For example, he arranged that consignments of rubber, which were invoiced as rubber, should be shipped as gum, not only in the case of the *Kim* but in various other cases.

Evidence in considerable detail as to the activities of Mr. John H. Gans was furnished in an affidavit of Mr. Woods, secretary of the Prize Department of the Procurator-General. From the outbreak of war Mr. Gans was engaged at New York in the organization and use of neutral shipping for the belligerent purposes of Germany. As an instance it is sufficient to mention a clearance of neutral vessels from New York upon perjured affidavits for the purpose of delivering supplies to German warships at sea, a transaction which resulted, shortly after the death of Mr. Gans, in the prosecution by the United States Government and the conviction of some of the persons who were engaged with him in the transaction. Mr. Woods' affidavit also gives evidence of occasions in which Mr. Gans was the means of dispatching to Europe early in the war large consignments of foodstuffs purchased by the German Government in the United States.

Taking into account the activity of Mr. Gans in every field in which he was able to give active assistance to the enemy, I have no doubt that the true inference from the facts as to the Gans line to Copenhagen is that he organized it as a means of furnishing to the German Government through Copenhagen the regular service of necessary supplies which, as is notorious and as the intercepted messages show, they were unable to obtain through previously existing means of transport.

The part which was played by the charterers, through Mr. John H. Gans, in the organization and management of the contraband service in which the *Kim*, the *Björnstjerne Björnson* and the *Alfred Nobel* were engaged by them, is aggravated by numerous false statements made, no doubt on instructions of the charterers, contained in the letter of their solicitors dated in December, 1914, in which the solicitors discuss the charge of "shipment of conditional contraband by indirect routing through Scandinavian countries"; and the three affidavits

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

made early in 1915, in which Mr. Gans himself dealt with the same matter.

The knowledge of the charterers being of the complete kind which arose from organization and conduct of the undertaking, the facts as to the personal knowledge of the owners and the knowledge of the several masters require to be considered. Neither of the owners gives in his affidavit any explicit statement as to the information he had before his ship left New York of the voyage in question and the nature of the cargo. Neither of them denies such knowledge, and two of them are shown to have had it. The respective masters had very complete knowledge of what was going on, as their affidavits show. They signed the bills of lading, other than the through bills of lading, and superintended the shipment of the cargo. They knew the novelty of the trade, and must I think have been aware of the position and activity of Mr. Gans. At a time when precautions, by insistence on consignment to named neutral consignees in neutral countries and guarantees for neutral consumption, were being called for by cautious owners, they were aware that the Gans Line dispensed with any such precautions. The messages exchanged between the masters and owners of the *Kim* and *Björnstjerne Björnson* are an index to some of the questions which necessarily arose. The masters of the several ships were inevitably aware, in my opinion, of the meaning and effect of the wholesale shipments to Copenhagen in which they were taking part of goods which were conditional contraband.

As to the *Kim*, it is to be added that her master took part in the misdescription of the consignment of rubber which she carried.

The facts being as I have stated them, counsel for the Crown claimed condemnation of the three ships on the ground, in the first place, upon which judgment was given in this Court by Sir Samuel Evans in *The Hakan* (1)—namely, that there is a rule of international law whereby neutral vessels carrying contraband which by value, weight, volume or freight value forms more than half the cargo, are subject to condemnation.

(1) [1916] P. 266; [1918] A. C. 148.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

They contended also that there was proof as in *The Hakan* (1) of a time charter which enabled the charterers to use the ship for a contraband trade and made the acts of the charterers acts for which liability attached to the owners, and that the ships were subject to confiscation by reason of the undoubted participation of the masters in the contraband transaction. They also argued that there was evidence of actual knowledge of the owners. As to the *Kim*, a further ground of condemnation was alleged in respect of the carriage of contraband—namely, rubber—under a false description intentionally placed upon the ship's papers by the charterers and the master.

That the cargoes of the three ships in question came within the rule as to half contraband which Sir Samuel Evans stated in *The Hakan* (1) is unquestionable. I prefer, however, to deal in the present case with the question which was the chief subject of argument before me, that namely of the degree and nature of the "knowledge" which renders a ship liable to confiscation for carriage of contraband. Sir Samuel Evans found actual knowledge of the owners in *The Hakan* (1), and the case was decided in the Privy Council on that ground. "Knowledge on the part of the owners," it is said, "is sufficient to justify condemnation—at any rate when the goods in question constitute a substantial part of the cargo." These words were also used which tend to limit the operation of the rule: "There can be no confiscation without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo." The judgment in *The Hakan* (1) does not of itself supply a conclusive test for application in the present case.

Since the decision in *The Hakan* (1), the cases of *The Dirigo* (2) and *The Ran* (3) have been argued and determined in this Court. Each of them has a direct bearing on the problem now under consideration. *The Dirigo* (2) was a case of a whole cargo of contraband, and condemnation was claimed on that ground, apart from the facts which showed knowledge on the part of the owners. Lord Sterndale, however, thought it

(1) [1916] P. 266; [1918] A.C. 148. (2) [1919] P. 204.
(3) [1919] P. 317.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

well not to act on that contention but to examine whether there was such knowledge, taking in this respect the same course as he had taken in *The Zamora*. (1) Upon a finding of knowledge on the part of the owner the *Dirigo* was condemned. The knowledge which was found to have existed was knowledge of one G. W. McNear. The ship was the property of a corporation—G. W. McNear Inc.—whose affairs in the relevant transactions were conducted by G. W. McNear.

In *The Ran* (2), the owner of a Norwegian vessel chartered her to an American firm in October, 1914, for a single voyage from New York to Scandinavian ports between Bergen and Malmö, including Copenhagen. She loaded a miscellaneous cargo which included some parcels of copper, 33 cases of crude rubber, 2010 bundles of aluminium ingots, and 357 cases described as "gum," but in fact containing rubber. Lord Sterndale was not satisfied that the charterers had knowledge that the rubber in the 33 cases was misdescribed, and he said this: "It is to be remembered that knowledge of the misdescription is not of itself enough; there must be a knowledge of the misdescription under such circumstances as to lead to the inference that the person who knew of the misdescription also knew of the contraband nature and contraband destination of the goods. I can find no case in which such knowledge on the part of a charterer, even if it existed, has been held sufficient to justify the condemnation of the ship." Lord Sterndale also examined the grounds of the judgment of Sir Samuel Evans, P., in *The Hakan* (3), when that learned judge, speaking of a charter for the Baltic trade during the war, declared it to be no obstacle to condemnation "if owners in time of war and in waters favourable to contraband trading enter into time charter contracts." Lord Sterndale's commentary upon this view of the law is expressed in the following words: "I think he meant to say that if the result of the charter is to take the disposal of the vessel out of the hands of the owner and leave it to the charterer to do what he likes

(1) (1919) Lloyds' List, April 2. (2) [1919] P. 317, 327, 328.
(3) [1916] P. 266, 283.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

with her, then the owner cannot escape the consequences of what the charterer does, because he has chosen to give the control of the vessel over to the charterers." Lord Sterndale distinguished the case of *The Ran* from that of *The Hakan* (1), and pointed out that the *Hakan* was chartered for the purpose of the trade in the Baltic, including German ports, in which she was engaged at the time of seizure, whereas the *Ran* was chartered for a specific voyage from neutral port to neutral port, was engaged in trade apparently neutral at the time of seizure, and was only brought in question because the charterer "against the owner's wish" included in the lading of the vessel some minute portion of cargo destined for an enemy country.

So far as the present case is concerned Sir Samuel Evans' judgment in *The Hakan* (1) supports the claim of the Crown against the three ships claimed for condemnation, and its force is not weakened by the words of explanation used by Lord Sterndale in *The Ran*. (2) The judgment is relied upon by the Crown in support of a proposition that the time charterparties made by the owners of the *Kim*, the *Björnstjerne Björnson* and the *Alfred Nobel* with the Gans Shipping Company put it in the power of the charterers to make the use which they in fact made of the three ships, and that when the charterers made a hostile use of the ships which the power granted to them by the owners enabled them to make the owners became involved with the charterers in the consequences which that use of the ships entails.

Seeing that the judgments in *The Hakan* (3) and the other recent cases to which I have referred do not of themselves directly determine the questions involved in the present inquiry it is permissible to examine the matter in relation to more general considerations. The confiscation of ships by reason of a hostile part taken as between belligerents, or, as it has been called, "mixing in the war," is not limited to confiscation on account of the carriage of contraband to a belligerent; it extends to various breaches of neutrality.

(1) [1916] P. 266, 283. (2) [1919] P. 317, 237, 328.
(3) [1918] A. C. 148.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

Breach of blockade is one; engagement in the belligerent operations of the enemy covers a variety of others, among which are included transport service and the carriage of persons or stores or dispatches for warlike purposes. In many such cases the question has from time to time arisen which arises here—what is the knowledge on the part of an owner which involves him in liability to confiscation of his ship? When the hostile act in question is the breach of a blockade the ship owner is bound by the act of the master; the cargo owner is also bound if at the time of shipment the blockade was known or could have been known. Upon this subject art. 21 of the Declaration of London seems to add nothing to the conclusions of Lord Stowell in *The Alexander* (1), and *The Adonis* (2), and the judgment of the Privy Council in *The Panaghia Rhomba.* (3) Where the hostile act was the use of a ship as a transport, Lord Stowell in *The Carolina* (4) decreed condemnation, although, as he stated in a later case, *The Orozembo* (5), "the master was an involuntary agent acting under compulsion."

In *The Friendship* (6) and *The Orozembo* (5), the carriage of persons was the cause of forfeiture. Lord Stowell in the latter case discussed the question of mens rea. "It has been argued," he said, "as if the ignorance of the master alone would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the mens rea, if such a thing is necessary? or if those who had been employed to act for the owner had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the mens rea is necessary, that it should reside in those persons, as in the owner? . . . . The ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek

(1) (1801) 4 C. Rob. 93.
(2) (1804) 5 C. Rob. 256.
(3) (1858) 12 Moo. P. C. 168.
(4) (1802) 4 C. Rob. 256.
(5) (1807) 6 C. Rob. 430, 435.
(6) (1807) 6 C. Rob. 420.

1920

THE KIM; THE BJÖRNSTJERNE BJÖRNSON; THE ALFRED NOBEL.

The President.

his remedy in cases of deception, as well as of force, against those who have imposed upon him."

Lord Stowell did not, so far as I am aware, determine in a case of carriage of contraband, what knowledge on the part of the owner or his representative would warrant confiscation. In *The Neutralitet* (1), however, he did describe the relaxation of the ancient rule of confiscation upon mere proof of the fact of carriage as resulting from " the supposition that freights of noxious or doubtful articles might be taken without the personal knowledge of the owner."

In each of the present cases the master knew all the material facts at all material times and was actively concerned in his own ship's part in an enterprise which was calculated and designed to give vital assistance to the enemy. The charterers organized and conducted the enterprise. The owners of the *Kim* and the *Björnstjerne Björnson* are proved to have had knowledge of the voyage. The owners of the *Alfred Nobel* do not disclaim like knowledge. I do not proceed, however, upon distinctions applicable to one or other of the vessels, and I do not apply a separate rule in the case of the *Kim* because of the shipment of rubber under a false description. The broad facts as to the whole undertaking, the knowledge of the master, and the knowledge of the charterers seem to me to make a clear case for condemnation with regard to each vessel.

I decree condemnation of each of these ships, the *Kim*, the *Björnstjerne Björnson* and the *Alfred Nobel* as good and lawful prize.

Solicitor for the Procurator-General : *The Treasury Solicitor.*
Solicitors for the claimants : *Botterell & Roche.*

(1) (1801) 3 C. Rob. 295, 297.

E. C. T.

[BEFORE THE NAVAL PRIZE TRIBUNAL.]

(In Prize.)

1920
Jan. 30;
Mar. 12;
May 12.

THE ADOLPH and Other Ships.

Naval Prize Tribunal—Sums paid on Recommendation of Prize Claims Committee—Sums not recoverable in Prize Court—Naval Prize Act, 1918 (8 & 9 *Geo.* 5, *c.* 30), *Sch. Pt. II., para.* 4.

Under para. 4 of Part II. of the schedule to the Naval Prize Act, 1918, 8 & 9 Geo. 5, c. 30: "Charges on Naval Prize Fund" "include any claims in respect of any ship or goods subject to prize jurisdiction, which are droits of the Crown or which if condemned would have been droits of the Crown or of the proceeds of sale of, or money representing, any such ship or goods which the Treasury on the recommendation of the Prize Claims Committee may have paid or may hereafter pay, being claims of a nature that had they been established in prize proceedings would have been ordered by a Prize Court to be paid by the persons entitled to the ship or goods, or out of the money representing the same."

The Treasury, on the recommendation of the Prize Claims Committee, paid various claims for wages, disbursements, towage, mortgage and other matters in respect of ships condemned as prize and declared to be droits of the Crown, but none of the claims were of a character which could be supported in a Prize Court:—

Held, that as the second condition of para. 4 of the schedule was not fulfilled the sums paid by the Treasury were not repayable out of the Naval Prize Fund.

Claim by the Exchequer that certain sums paid by the Treasury on the recommendation of the Prize Claims Committee were payable out of the Naval Prize Fund, under para. 4 of Part II. of the schedule to the Naval Prize Act, 1918 (set out in the headnote). The claim was resisted on behalf of the naval forces. The nature of the claims paid and the argument on behalf of the Exchequer are fully stated in the judgment of the tribunal.

Sir Gordon Hewart A.-G. and *Pearce Higgins* for the Exchequer.

Sir Reginald Acland K.C. and *Darby* for the naval forces.

Cur. adv. vult.

May 12. The judgment of the tribunal (Lord Phillimore,

1920

THE ADOLPH.

Admiral of the Fleet Sir George Callaghan and Sir Guy Fleetwood Wilson) was delivered by

LORD PHILLIMORE. Under Part II. of the schedule to the Naval Prize Act, para. 4, certain claims in respect of ships subject to prize jurisdiction and being droits of the Crown have been preferred before this tribunal by the Solicitor of the Treasury on behalf of the Exchequer, as being payable out of the Naval Prize Fund.

Certain typical examples have been supplied to the tribunal. They are all instances of sums of money which the Treasury on the recommendation of the Prize Claims Committee has paid.

In *The Adolph* the claim was for necessaries supplied by a coaling company. In *The Concadoro,* for general disbursements on her behalf presumably of a nature similar to those in *The Adolph.* In *The Australia* it is wages to a seaman. In *The Ulla Boog* the claim was for dock dues; in *The Werner Vinnen* for towage. These expenditures were all before the war. These five cases seem to stand in one class.

In *The Emil* a firm of English shipowners had sold the vessel before the war to German owners, and received part only of the purchase-money and had a mortgage on the ship to secure the balance. The Prize Claims Committee recommended a payment of the principal without interest. In *The cargo ex Achaia* the claim was for an advance made on the security of the shipping documents; and in *The cargo ex Derfflinger* the goods had been sold to German firms but not paid for, and the lien of the unpaid vendors was recognized. These three cases again seem to stand in a class.

In *The Ulrich* the ship was sailing under a charter arranged by English shipbrokers, who would have collected the freight and deducted their commission. As the ship was seized the Crown collected the freight and the Prize Claims Committee allowed the brokerage.

The first condition of para. 4 of the schedule is that in order that this Tribunal should allow a charge on the Naval Prize Fund the claim must be one which the Treasury has

paid or will pay on the recommendation of the Prize Claims Committee.

This Committee, which was a purely consultative body, but to which the Naval Prize Act refers as an authority, consists of a body of eminent persons appointed by the Lords Commissioners of the Treasury on November 18, 1914, with the following reference :—

" To receive and consider claims made by British, Allied, or Neutral third parties against ships or cargoes which have been condemned or detained by orders of Prize Courts, and to recommend to what extent, in what manner, and on what terms such claims should be met or provided for out of the Prize Funds."

It will be observed that the reference only mentions cases where ships or cargoes have been condemned as prize or have been detained under the Hague Convention. The paragraph in the Naval Prize Act rather looks as if the draftsman had supposed that the reference was wider, because it speaks of " claims in respect of any ship or goods . . . . which are droits of the Crown or which if condemned would have been droits of the Crown," which at first sight looks as if the Prize Claims Committee might sometimes have to deal with claims where the vessel had been released. Possibly the words " which if condemned would have been droits of the Crown " may be meant to cover cases of detention under the Hague Convention. Passing this question by, we have next to consider the second condition ; any claim with which we deal must be in respect of money which the Treasury pays on the recommendation of the Prize Claims Committee—Condition No. 1. But it must also be a claim " of a nature that had ' it ' been established in prize proceedings would have been ordered by a Prize Court to be paid "—Condition No. 2.

We are, however, informed that the Prize Claims Committee has made it a rule to entertain no claims which could be supported in the Prize Court, which apparently leaves us in the position that the statute requires the claim to fulfil two conditions, and the action of the Prize Claims Committee has been such that it never can fulfil both. It may be noted

1920

THE ADOLPH.

Lord Phillimore.

that there is nothing in the reference precluding the Prize Claims Committee from entertaining claims which could be preferred in the Prize Court. It is conceivable that an applicant might have put his case before the Prize Claims Committee in this way: "I think I have a good case for submission to the Prize Court, but instead of going to that Court to have it decided, and to have it assessed, I will be content with anything that you will recommend for me." And in that event, the claim might fulfil the two conditions of this paragraph. But, on the other hand, it is to be presumed that those who framed this paragraph and submitted it to Parliament were aware of the fact that the Prize Claims Committee had never construed its reference so as to enable it to do anything of the kind.

The construction of the paragraph submitted by the Attorney-General on behalf of the Exchequer was that it referred to claims of a nature which if it had been possible to establish them in a Prize Court, as it is not, would have been ordered to be paid, and he supposed that this would cover cases of mortgage and bottomry. What a Prize Court would do, if it could do what it cannot do, it is impossible to say. The possibilities are infinite. We cannot accept this construction.

Then there is the third condition. The Prize Court is to order money to be paid "by the persons entitled to the ship or goods or out of money representing the same." Who are the persons entitled to the ship or goods? Counsel on both sides suggested that it means the captors, but they are not and never were entitled to the ship or goods. If there had been a Prize Act, as there is not, or a proclamation, as there is not, giving to the actual captors any ship or goods which they captured and procured to be condemned as prize, they might possibly be considered as the persons entitled to the ship or goods. But, again, there is no such Prize Act and no such proclamation. Moreover, the Legislature seems to have known how to express itself when it wanted to refer to the actual captors, because they are mentioned by name in the succeeding para. 5. The idea occurred during the course of the

argument that para. 4 might be intended to cover cases where the Prize Court would have ordered payment out of the proceeds of the prize; for example, for such matters as pilotage and towage, if not paid by the marshal and deducted as an expense from the gross proceeds, or for salvage. We have a claim for salvage of a prize now pending before us. But this suggestion is answered, because such a case is covered by para. 5; so that para. 4 seems unnecessary. It is just possible that a scintilla of meaning could be given to para. 4 if it were to be considered as giving power to the Prize Claims Committee to assess claims that would come under para. 5, so that the claims could come to the Naval Prize Tribunal for a liquidated sum instead of leaving it to this Tribunal to assess and liquidate.

However all this may be, it is not so much for the Tribunal to discover what cases fall within para. 4 as to determine whether the present applications do fall within it. They are applications which fulfil the first condition. The Treasury has paid or will pay the claims upon the recommendation of the Prize Claims Committee. But they are confessedly not claims of a nature which could have been established in prize proceedings, and therefore they are not claims which would have been ordered by a Prize Court to be paid by anyone or out of any funds, and therefore we must disallow them.

It is satisfactory to think that this decision follows the practice with regard to such matters on grants of prize in former wars. In cases where a claim was established by a third party as mortgagee, bottomry bondholder, or as having a lien on a parcel of cargo, the Crown made a grant to him of its bounty out of the national Exchequer, and not out of the proceeds of the prize, and the captors took the whole proceeds undiminished and free of any charge.

Solicitor for the Exchequer and for the naval forces: *The Treasury Solicitor.*

E. C. T.

P. D.
1920
May 3, 20.
C. A.
June 7.

[IN THE COURT OF APPEAL.]

BETTON-BRIGHT *v.* BETTON-BRIGHT.

Divorce—Practice—Wife's Costs—Wife's Petition dismissed—Usual Order—Limit to Amount for which Husband ordered to give Security.

On a wife's petition for divorce, where the husband has been ordered to pay the petitioner's costs up to a certain date and to lodge in Court or give security for a fixed sum to cover the costs and expenses of the petitioner of and incidental to the hearing of the suit, and there has been no appeal from the Registrar as to amount and no order for further security, the wife is not entitled under the "usual order for wife's costs" to a larger sum than that lodged in Court or for which security has been given:—

So held by the Court of Appeal affirming the decision of Sir Henry Duke P.

Per Atkin L.J. In drawing up the decree it is desirable in the future that the order for the wife's costs should not be expressed in the form "usual order for wife's costs" but that the order should state in terms what the order for costs is.

SUMMONS adjourned into Court.

A wife petitioned for divorce on the ground of her husband's cruelty and adultery. Pending the suit the usual order was made, on the wife's application, that the husband should pay her costs up to date taxed at 30*l.* 13*s.* 6*d.* and lodge in Court or give security for "the sum of 30*l.* estimated by one of the said Registrars as sufficient to cover the costs and expenses of the petitioner of and incidental to the hearing of the cause." The Registrar's estimate was based on the assumption that the cause would be decided in one day, as in fact it was. There had been no appeal from the Registrar's decision and no application for increased security for the wife's costs. At the hearing Horridge J. found against the petitioner on both her grounds of complaint, dismissed her petition, and dealt with the costs by a direction which was expressed in the decree in the words: "Usual order for wife's costs."

The wife's solicitors carried in for taxation a bill for further costs amounting to 40*l.* 9*s.* The Registrar taxed the costs at 30*l.*, holding that the petitioner was not entitled upon a

decree in the form of that made by Horridge J. to recover from her husband costs in excess of the amount ordered before the hearing to be paid into Court or secured.

An objection to this taxation was carried in by the petitioner and answered by the Registrar.

The petitioner took out the present summons, asking that her objection to the taxation should be allowed. The summons came before the President on April 26, 1920, who directed it to be adjourned into Court for argument.

The summons came on for hearing before the President on May 3. The respondent did not appear.

H. D. Grazebrook for the summons. The practice of the Court is settled by *Robertson* v. *Robertson* (1) which has been approved and followed in *Hurley* v. *Hurley* (2), *Kemp-Welch* v. *Kemp-Welch* (3) and by Sir Samuel Evans in *Palmer* v. *Palmer*. (4)

Cur. adv. vult.

May 20. SIR HENRY DUKE P. This is a summons for a review of taxation of the wife's costs in a suit where the wife, who was the petitioner, was unsuccessful. [The President stated the facts as above set out and proceeded :] Objection to the taxation is taken by the petitioner on this ground : " At the trial the judge gave to the petitioner the usual costs, and it is submitted that the principle upon which the petitioner's bill of costs should be taxed is laid down in *Palmer* v. *Palmer* (4) in which it was decided the words ' the usual costs ' mean that the costs are not to be limited as to any part thereof to a previous estimate, but are to be such costs as are ascertained on taxation to be the proper costs to allow in a strict taxation between party and party." The learned Registrar points out in his answer to the objection that in *Palmer* v. *Palmer* (4) the trial lasted more than one day. Counsel for the wife had applied for and obtained further security, and it had been ordered at the hearing that " The petitioner should pay the respondent her taxed costs, not to

(1) (1881) 6 P. D. 119.
(2) [1891] P. 367.
(3) [1910] P. 233.
(4) [1914] P. 116.

C. A. 1920

BETTON-BRIGHT v. BETTON-BRIGHT.

The President.

exceed the amount ordered to be paid into Court or secured for the wife's costs of hearing, together with such further sum as would have been ordered to be paid into Court or secured had the duration of the hearing been known at the date of such order."

The learned Registrar also states that the practice under the circumstances of the present case is to tax the wife's costs up to the amount secured.

Mr. Grazebrook, who argued the case for the petitioner, relied upon the decision on the general question given by the Court of Appeal in *Robertson* v. *Robertson* (1), and upon the judgment of my predecessor, Sir Samuel Evans, in *Palmer* v. *Palmer*. (2) This judgment he regarded as a judicial interpretation of the term "usual order for wife's costs," which has attached to it an invariable meaning.

There are passages in the judgment in question which appear at first sight to support this contention, but it is at variance with the well-known practice in the Registry. Examination of the practice and the authorities must determine whether the practice is, or is not, consistent with the authorities.

I have inquired in the Registry as to the practice followed since the direction given by Lord Gorell in November, 1908, in *Harrison* v. *Harrison* (3), which is set out in *Palmer* v. *Palmer* (4), not only in cases like *Palmer* v. *Palmer* (2), but in cases like the present. The practice is stated comprehensively as follows: When increase of security is ordered during the hearing, and no special order as to costs is subsequently made, the decree is drawn up in the form prescribed by Lord Gorell, and taxation proceeds in accordance therewith. When security is fixed before the hearing and no order for increased security is made during the hearing, and the decree gives the wife the usual costs, the practice is to limit the wife's costs upon taxation by the amount ordered before the hearing to be paid in or secured.

The only question of principle raised by the present application seems to me to be whether the direction to tax the

(1) 6 P. D. 119.
(2) [1914] P. 116.
(3) Nov. 1908; not reported.
(4) [1914] P. 116, 120.

usual costs of an unsuccessful petitioner, which is in effect the direction given at the trial, is an exercise of the discretion of the Court which has been duly carried out in the Registry. The matter cannot properly be dealt with upon a supposition that there is, as regards the wife, one usual order which applies to all the possible events of such causes. The usual order in cases like *Palmer* v. *Palmer* (1), where during the hearing the Court has ordered an increase of security, is not, and ought not to be, the usual order in cases like the present, where, before the hearing, the Court has determined what provision by the husband is necessary in order to enable the wife to present her case to the Court; and upon that provision being made the cause has proceeded in due course to a decision. The principles laid down in *Robertson* v. *Robertson* (2) as to the obligations of the husband with regard to the wife's costs, and the exercise of the discretion of the Court in making an order for such costs, seem to me to be in no way contravened by the action taken in this case. The learned judge at the trial dealt with a state of facts which is of everyday occurrence, by a direction which was perfectly plain, which was not misunderstood by the taxing Master, and which has been carried into effect. As to the words of the judgment in *Palmer* v. *Palmer* (1) with regard to "the usual order," which are set out in the notice of objection, and were relied upon in argument for the petitioner, they relate to the usual order in a class of cases in which this is not included, the class namely in which the Court has directed at the trial that additional security should be given for the wife's costs, and has afterwards directed that the wife's costs should be taxed and paid. That this is no new view appears from the statement as to the practice in this Division made by Lindley L.J. in *Russell* v. *Russell* (3): "On the dismissal of a wife's petition her solicitor usually gets his costs to the amount of the money paid into Court by the husband, or to the amount of the bond given by him. But an order to this effect is necessary, and the solicitor cannot, without an order,

(1) [1914] P. 116. (2) 6 P. D. 119.
(3) [1892] P. 152, 155.

C. A. 1920

BETTON-BRIGHT v. BETTON-BRIGHT.

The President.

get any costs, either out of the money in Court or by having recourse to the bond." The order referred to by Lindley L.J. is of course the order of the judge at the trial.

Only two other things need be said. First, it was recognized in *Robertson* v. *Robertson* (1) that the old rule of the common law, whereby upon marriage the wife's personal property vested in the husband, underlay the practice of the Ecclesiastical Courts and the Divorce Court as to the wife's costs; and in *Otway* v. *Otway* (2) the Lords Justices pointed out the new considerations which arise in respect of marriages solemnized after the coming into operation of the Married Women's Property Act, 1882. Secondly, there is to-day, no less than there was in Lord Hannen's time, necessity for constant care lest the safeguards which this Court has set up to protect the honest interests of wives involved in litigation in this Division should be used to prevent the access to the Court of men of small means, who are entitled to the remedies it can give. All that was said on this subject by Lord Hannen, when he decided *Smith* v. *Smith* (3), is matter of common knowledge among those who now administer the jurisdiction in matrimonial causes.

The application of the petitioner fails and must be dismissed.

J. R. B.

Leave to appeal was refused.

The petitioner, having obtained the leave of the Court of Appeal, appealed. The appeal was heard on June 7, 1920. Neither the respondent nor her solicitor appeared or was represented on the appeal.

H. D. Grazebrook for the appellant. The costs of the wife payable by the husband are not limited to the amount paid into Court or secured by the husband for that purpose: *Robertson* v. *Robertson*. (1) And it is immaterial for this purpose whether the wife brings the suit or the suit is brought against her. The genesis of the usual order of wife's costs is pointed out by Jessel M.R. in *Robertson* v. *Robertson*. (1)

(1) 6 P. D. 119. (2) (1888) 13 P. D. 141, 155.
(3) (1882) 7 P. D. 84, 88.

It arose from a false analogy to the order made in the old Ecclesiastical Courts. Under the practice of those Courts the whole of the evidence was taken upon affidavit, and it was therefore perfectly easy to ascertain before the hearing of the suit the amount of the costs. Under the present practice where the evidence is oral this cannot be done. It is not known beforehand the number of witnesses that will be called or the length of time the hearing will occupy. The old rule is therefore not applicable.

There are, of course, cases where the judge in making the usual order for the wife's costs has directed that the costs of certain issues should be eliminated, as in *Ash* v. *Ash* (1), where the wife was deprived of the costs of unnecessary charges of cruelty which had been condoned. *Robertson* v. *Robertson* (2) was referred to with approval by the Court of Appeal in *Kemp-Welch* v. *Kemp-Welch* (3) as late as 1910. In *Smith* v. *Smith* (4) it was held that if in a divorce suit in which the wife was found guilty the Court was asked to order payment of her full costs, the Court would postpone its decision until after her bill had been taxed.

[ATKIN L.J. The order in the Court below in that case was made a fortnight before the decision in *Robertson* v. *Robertson*. (2)]

Robertson v. *Robertson* (2) was expressly approved of in 1914 by Sir Samuel Evans in *Palmer* v. *Palmer*. (5) In that case it was held that the Registrar was right in taxing the bill of costs of an unsuccessful wife as between party and party, in accordance with the principle laid down by the Court of Appeal in *Robertson* v. *Robertson*. (2) It is submitted, therefore, that when the judge is asked to grant costs under Rule 159 of the Divorce Rules there are two forms of order: (1.) the usual order, which was the order in this case, and (2.) a direct order by the judge that the wife should only have the costs for which security has been given. The latter order was made by Horridge J. in *Stuart* v. *Stuart*. (6)

(1) [1893] P. 222.
(2) 6 P. D. 119.
(3) [1910] P. 233.
(4) 7 P. D. 84.
(5) [1914] P. 116.
(6) "Times" Newspaper, March 6, 1920.

C. A. 1920.

BETTON-BRIGHT v. BETTON-BRIGHT.

[ATKIN L.J. It would be better in drawing up future orders not to insert the words "usual order" but to state what the order is.]

LORD STERNDALE M.R. When the application for leave to appeal was made to us in this case I had some doubt whether it ought to be granted. I think this appeal proceeds on a misapprehension. What took place was this: the wife failed in her petition for divorce and some provision had to be made for her costs. Horridge J. made an order that there should be the "Usual order for wife's costs." The order was drawn up giving no more costs than the amount for which security had been ordered.

The important question to my mind is what according to the practice of the Court is the meaning of the "usual order for wife's costs." If there be no such thing as a "usual order" then the expression is meaningless. If there be then what is the order which should have been made? I find in Mr. Rayden's excellent book on Divorce Practice, p. 195, § 22, this statement: "When a wife, (not being proved to have sufficient separate estate) who has obtained an order for security against her husband, fails in her suit, she may obtain an order for costs against him: the order usually made is that such costs shall not exceed the amount secured." And in a note to that statement I find all the cases which have been cited to us referred to except *Palmer* v. *Palmer*. (1) I find also in 1892, long after *Robertson* v. *Robertson* (2) was decided, Lindley L.J. in *Russell* v. *Russell* (3), saying: "On the dismissal of a wife's petition her solicitor usually gets his costs to the amount of the money paid into Court by the husband, or to the amount of the bond given by him." It is said that after *Robertson* v. *Robertson* (2) a "usual order" meant an unlimited order, except in cases where the wife had acted improperly in the conduct of the suit. The decision in that case was that although the old practice of the Ecclesiastical Courts was that the wife's costs should be

(1) [1914] P. 116. (2) 6 P. D. 119.
(3) [1892] P. 152, 155.

limited to the amount secured or paid into Court yet that did not lay down a hard and fast rule. That was the decision. There were remarks made by the learned judges, with which one would not think of differing even if one desired to do so, to the effect that, prima facie, a wife properly defending herself, or properly bringing her suit, was entitled to her costs, and if there be a miscalculation as to the amount of security, that ought not to prevent the judge from giving her the full amount of the costs. Now, as I say, it may very well be that after that decision it would have been well that the usual order should be that the wife was entitled to her costs; and that an order with a limitation upon the amount of the costs should have been an unusual order. But that is not the question we have to decide. What we have to decide is whether in this present year the usual order means the limited order or the unlimited order. I have no doubt whatever that the learned President was right when he said that the usual order was an order limited to the amount of the security. I have equally no doubt that it is in the discretion of the judge at the trial if he think right; or afterwards, if an application be made to him within proper time, to say that the wife shall have more than that limited amount of costs. And I have also no doubt, after the decision in *Palmer* v. *Palmer* (1), that in cases where an application for further security has been made, the usual order is the one directed by Lord Gorell in 1908—that is to say that the petitioner do pay to the respondent her taxed costs not to exceed the amount ordered to be paid into Court or secured for the wife's costs of the hearing together with such further sum as, in the opinion of the taxing Registrar, would have been allowed if the duration of the trial had been known at the time of such previous order. There are now, therefore, really two forms of usual order: one is the usual order where no further application for security has been made; the other is the usual order where further application has been made. The second one is settled by that order of Lord Gorell. The first one, according to the inquiries of the learned

(1) [1914] P. 116.

C. A. 1920

BETTON-BRIGHT v. BETTON-BRIGHT.

Lord Sterndale M.R.

President made in the Registry, according to the statement in Mr. Rayden's Divorce Practice, and according to the statement of Lindley L.J. in the case of *Russell* v. *Russell* (1) is that the costs are limited to the amount of the security. That is, in fact, the usual order, and that is the order which the learned judge has here made. As I say, to my mind this appeal proceeds altogether upon a misapprehension. What ought to have been done was for an application to have been made to the learned judge that the wife's costs should not be limited to the amount of the security. The learned judge would then have exercised his discretion upon that matter and have made an order one way or the other. He was not asked to do so; he was only asked for the usual order, and he made the usual order, and the usual order is the limited order, as I have said. It seems to me that all these cases which have been cited to us do not show that this is not the usual order. I agree with the opinion of the learned judge below, and I think this appeal should be dismissed.

ATKIN L.J. I agree. I do not think it desirable to add anything to the reasons given by the Master of the Rolls on a question of practice, except this, that it appears to me desirable in drawing up the decree that the order for costs should be written at large, and not merely expressed in the form of "the usual order." Then it is quite plain to everybody what the order is.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Cardew, Smith & Ross.*

(1) [1892] P. 152.

W. I. C.

[ADMIRALTY.]

(In Prize.)

1920
July 30;
Mar. 30, 31;
Apr. 21.

THE PELLWORM And Other Ships.

[1917. No. 1657.]

Prize Court—Enemy Vessels—Captures in Neutral Territorial Waters—Requisition—Vessels lost by Enemy Action—Claim for Restitution by Neutral Government—Treaty of Versailles, art. 297—*Prize Court Rules,* 1914, *Order* XXIX.

Four German merchant vessels, on being sighted by a flotilla of British warships, hauled down their flags outside Dutch territorial waters. They were signalled to stop, but they continued to try to escape and shaped their course towards the land; and although they eventually stopped their engines after shots had been fired across their bows, they took no notice of signals made to them to go astern, and when they finally brought up and were boarded and seized they were within three miles of the Dutch coast.

Lord Sterndale, on the facts, held that the hauling down of the flags was not a submission to capture, and that when the captures were completed and the vessels seized all four were within Dutch territorial waters, but that there was no intention on the part of the British warships to violate Dutch neutrality. The Crown's claim for condemnation and the Dutch Government's claim for damages and costs, accordingly, were rejected. Further consideration of the cause was reserved inasmuch as the vessels had been requisitioned by the Admiralty under Order XXIX. of the Prize Court Rules, 1914, upon the usual undertaking for payment of the appraised values, and two of the vessels had been sunk by German submarines.

By art. 297 of the Treaty of Versailles, ratified after the hearing before Lord Sterndale, Germany ceded to the Allied Powers the right to retain and liquidate all property and interests within their territories belonging to German subjects.

On the claim of the Dutch Government for restitution of the vessels or their value:—

Held, by Sir Henry Duke, P., that the seizures in territorial waters created no proprietary rights over the vessels on the part of the Dutch Government; that the claim by the Dutch Government was merely on behalf of the German owners to whom the vessels or their value would be handed over; that having been requisitioned the vessels became the property of the Crown and for all purposes of prize jurisdiction were represented by the appraised values; that the subject-matter of the claims being the beneficial interest in sums of money

1920

THE PELLWORM.

belonging to German nationals, these sums fell within art. 297 of the Treaty and must be retained; and, accordingly, that the claim of the Dutch Government must be dismissed.

ACTION for condemnation of four enemy vessels.

Claim by the Dutch Government for the release of the vessels, for damages and costs, and for compensation for user.

On July 16, 1917, four German merchant vessels, the *Pellworm*, *Breitzig*, *Marie Horn*, and *Heinz Blumberg*, were captured by a flotilla of British destroyers off the Dutch coast. All four vessels were carrying the German mercantile flag. As soon as they were sighted by the destroyers the flags were hauled down and the four vessels altered course towards the shore. They were signalled to stop but paid no attention until shots were fired across their bows. They were then signalled to go astern but took no notice, and with the headway they had on had admittedly got within Dutch territorial waters when boarding parties reached them and they were seized as prize.

LORD STERNDALE in giving judgment, after dealing at length with the evidence as to the position of the several vessels, said that the conclusion to which he had come was that the German vessels were outside the territorial limit when sighted and signalled to stop, and were close upon it if not within it when they stopped, but were well within it when a boarding party was put on board and possession actually taken of them. [His Lordship continued as follows:] The question is whether in these circumstances there was a violation of Dutch neutrality. For the Crown it was contended that the capture took place outside territorial waters when the German vessels hauled down their flags, or at any rate when they stopped their engines, and that from that time they were entirely under the control of the British destroyers. In this state of things it was contended that the putting a boarding party on board was only an act done in the management of a ship already captured, and was therefore not an act of war done within neutral

waters. In support of this contention *The Rebeckah* (1) and *The Edward and Mary* (2) were cited. I do not think that these authorities give much help in this case. They were concerned with the rights of contending captors between themselves, and not with the rights of neutrals in territorial waters.

It is not however necessary to decide whether the formal taking possession of a vessel which had already submitted to capture is a violation of neutrality if done within territorial waters, because in my opinion there was in this case no such submission or 'deditio' as it is called in *The Rebeckah*. (1) The hauling down of the flags by the German vessels was not a submission to capture, because the commander of the *Sylph* [one of the British destroyers] states distinctly that it was done first at the time they altered course towards the shore, in order if possible to escape. Nor do I think that the stopping of the vessels' engines was such a submission. They submitted, so far as to stop their engines in order to avoid being sunk by gunfire, but they continued to make way towards the shore by carrying their headway, and, after that was lost, by drifting; and they refused to go astern or to steer to the westward when ordered to do so. It may be that at first the signal to steer to the westward was not understood, but in the case of the *Marie Horn* at any rate there is distinct evidence that when followed and hailed to go astern or steer to the westward, she would not do so. I think the other vessels were doing the same, and that the object of all of them was if possible, although they had stopped their engines, to escape into neutral waters and avoid capture. The act of capture was not in my opinion complete until the boarding party took possession, and as this was in each case after the captured vessel was in Dutch territorial waters, there was a violation of Dutch neutrality and the vessels must be released.

I do not however think that there was any deliberate intention so to violate it. Some of these same destroyers

(1) (1799) 1 C. Rob. 227. (2) (1801) 3 C. Rob. 305.

1920

THE PELLWORM.

Lord Sterndale M.R.

had followed other vessels immediately before, and had left them on finding that they were in Dutch waters, and I do not find in this case any of those circumstances which are necessary in order to subject the Crown to a liability for damages or costs.

Further consideration of the case was reserved.

In consequence of the decision of Lord Sterndale the claimants delivered particulars of the relief claimed—namely, that the vessels "should be restored within Dutch territorial waters in a like condition as to vessel, cargo and equipment to that at the time of capture, or alternatively with compensation for any loss or depreciation."

On July 31, 1917, all four vessels had been requisitioned by the Admiralty after appraisement upon the usual undertaking for payment of the appraised values as the Court might direct; and while being employed as colliers two of them, the *Pellworm* and the *Marie Horn*, had been sunk without warning by German submarines.

By art. 297 of the Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles and ratified after the hearing before Lord Sterndale, Germany ceded to the Powers respectively the right to retain and liquidate all property and interests within their territories belonging to German subjects at the date of the coming into force of the Treaty; and by Annex III. to Part VIII. the property in all German-owned ships of 1600 tons and upwards, and a moiety of ships between 1000 and 1600 tons, was also ceded to the Powers.

R. A. Wright K.C. and *Bisschop* for the Dutch Government. When the Procurator-General parted with the safe possession of the seized vessels pendente lite to the Admiralty on requisition, he did so at his peril and on the terms that the Crown would restore to the Prize Court either the vessels themselves or their value. It is immaterial, therefore, that two of the vessels have been sunk. It is only because the vessels were released to the Admiralty that no bail has

actually been given, as in the case of release to claimants. Requisition orders are based on municipal law, and the delivery to the Admiralty under these orders does not bind foreign States.

It is also immaterial that under the Treaty of Versailles German property in this country can be retained and liquidated. The Dutch Government are not parties to the Treaty, and, according to international law, have the right to demand that these vessels captured in their territorial waters should be handed over to them : see *The Düsseldorf* (1) and *The Valeria* (2) following the decision of Lord Stowell in *The Vrow Anna Catharina* (3), and the American case of *The Anne.* (4) The Court cannot go into the question whether the Dutch Government would hand the vessels over to their German owners or not. Further it should have been a condition of the requisition order that provision should have been made for compensation for the user of the vessels. The Admiralty have had the use of the vessels for a long time, and, as the Crown's possession of them was wrongful, the Dutch Government should receive compensation for their use in addition to the return of the *Breitzig* and the *Heinz Blumberg* and the appraised values of the *Pellworm* and the *Marie Horn.*

Sir Erle Richards K.C. and *Arthur Page* (at the hearing before Lord Sterndale) watched the proceedings on behalf of the German shipowners and cargo owners.

Butler Aspinall K.C. and *C. R. Dunlop K.C.* (*Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.* with them) for the Procurator-General. As regards the claim for compensation—i.e., the profits that might have been made by somebody during the time the vessels were in the possession of the Admiralty—after the decision in *The Düsseldorf* (1) there was a similar application in chambers on behalf of the Norwegian Government, and Lord Sterndale dismissed the summons on the ground that the Norwegian Government

(1) [1919] P. 245.
(2) Ante, p. 81.
(3) (1803) 5 C. Rob. 15.
(4) (1818) 3 Wheat. 435.

1920

THE PELLWORM.

were acting as trustees for enemies into whose pockets the money would ultimately go. The Dutch Government occupy a similar position in the present cases. Apart from the Treaty of Versailles, under Lord Sterndale's decision the claimants would be entitled to the return of the two vessels still afloat, but as regards the two which have been sunk by the wrongful act of the Germans in flagrant violation of international law, if the Dutch Government were entitled to the appraised values of these vessels the Germans would obtain a pecuniary advantage from their own wrong.

By the Treaty, however, Germany has agreed to German property in this country being retained and liquidated, and the ceding of her ships is also specially provided for. The Dutch Government are in the position of trustees for the late enemies of the Crown, and as, under the Treaty, the ships or their value have to be ceded, the claim of the Dutch Government for restoration should be dismissed. The neutral Government whose territorial waters have been violated has no absolute right to restitution; the Court can examine the circumstances, and will always have regard to the question as to whose pockets the money will go into: see Westlake's International Law, Part II., p. 229, and cf. *The Palm Branch.* (1) The German owners would have had no right to claim the vessels in the municipal Courts of Holland unless they were delivered over to Holland, and, but for the intervention of the Dutch Government, they would be liable to condemnation as prize in this country although captured in neutral territorial waters: see *The Bangor.* (2) The orders of requisition vested the property in the ships in the Crown for all purposes, and the claim for payment on account of user is inconsistent with the orders and in effect a claim for damages, and a claim therefore already disallowed by the judgment of Lord Sterndale.

Bisschop replied.

Cur. adv. vult.

April 21. THE PRESIDENT (SIR HENRY DUKE). This is a claim of the Netherlands Government on behalf of Her

(1) [1919] A. C. 272. (2) [1916] P. 181.

1920

THE PELLWORM.

The President.

Majesty The Queen of the Netherlands in respect of the seizure of four German steamships, the *Pellworm*, the *Marie Horn*, the *Heinz Blumberg* and the *Breitzig*, with their cargoes of fuel, which was made by ships of His Majesty's Navy on July 17, 1917. The ships were brought in forthwith for condemnation, and causes of condemnation were duly commenced on July 25, 1917. On July 31, 1917, upon application by the Admiralty pursuant to Order XXIX. of the Prize Court Rules, 1914, leave was given to requisition the ships and their cargoes subject to appraisement and the usual undertakings, and on August 11, after appraisement, the ships were released to the Admiralty upon the undertaking of the Procurator-General for payment of the appraised values as the Court might direct. The cargoes were also delivered to the Admiralty.

In December, 1917, the Netherlands Government appeared in the several causes and made claims for release of the ships with costs, damages and expenses on the ground that the seizures had been made in the territorial waters of the Netherlands. There are claims to the cargoes by or on behalf of various claimants, but no evidence with regard to these was brought to my notice. Three of these claimants are neutrals.

In July last the claims in relation to the ships were heard by Lord Sterndale, who found that the seizure had in each case been made within the territorial waters of the Netherlands but without any intention to violate the neutrality of Holland. Lord Sterndale made a declaration as to the locality of the seizures, rejected the claims for damages and costs and reserved further consideration of the cause.

Upon further consideration evidence was received as to certain material events subsequent to the seizure. As to the ships, it was shown that the *Pellworm* and the *Marie Horn* were employed after delivery to the Admiralty as colliers plying between Wales and North France ; the *Pellworm* until October 9, 1917, when she was sunk by an enemy submarine without warning, and eighteen of the crew were drowned ; the *Marie Horn* until May 8, 1918, when she

1920

THE PELLWORM.

The President.

was sunk by an enemy submarine without warning and two of her crew were drowned. The *Heinz Blumberg* and the *Breitzig* after being employed by the Admiralty on various duties, were at the date of the hearing before me engaged in the British coasting trade.

Between the hearing and the further consideration of the case the Treaty of Peace between the Allied Powers and Germany, which was signed at Versailles on June 28, 1919, had been ratified, and Annex III. to Part VIII. and art. 297 thereof have a bearing upon the present claim. By Annex III. Germany ceded to the Powers the property in all German owned ships of 1600 tons and upwards, and in one-half, reckoned in tonnage, of all German owned ships between 1000 and 1600 tons, and undertook within two months of the coming into force of the Treaty to deliver up the ships so ceded. By art. 297 Germany ceded to the Powers respectively the right to retain and liquidate all property and interests within their territories belonging to German subjects at the date of the coming into force of the Treaty, leaving the expropriated owners to look to the German State for compensation in respect of such expropriation. An Order of His Majesty in Council, dated August 18, 1919, made in pursuance of the Treaty of Peace Act, 1919, has provided official agencies in this country for dealing with the property and interests in the United Kingdom which pass under the Treaty.

Of the ships here in question, one, the *Heinz Blumberg*, was of 1600 tons gross measurement or more, but for reasons which will appear I do not find it necessary to deal separately with the cases of the several vessels.

The claimants delivered particulars of the relief claimed by them in consequence of the decision of Lord Sterndale. The claims include delivery up of the ships still in being in like condition as at the time of capture; compensation for user of the ships since the requisition; compensation in value for the cargoes requisitioned, and the values of the ships lost. The answer made on the part of the Crown alleges in respect of the ships the release and delivery to the Admir-

alty under orders of the Court for requisition of all four and the sinking of the *Pellworm* and *Marie Horn* by enemy action "in flagrant contradiction to the rules of International Law." It admits the delivery under requisition and the disposal and consumption of the requisitioned cargoes. As to ships and cargoes and all claims in respect of them, the answer further sets up Annex III. and art. 297 of the Treaty of Versailles, and submits that in the events that have happened no order should be made for delivery or payment to the claimants.

Counsel for the claimants insisted before me on their right to delivery of the vessels remaining in the possession of the Crown under the rule laid down by Lord Stowell in *The Vrow Anna Catharina* (1), which has been recently applied by this Court in *The Düsseldorf* (2) and *The Valeria*. (3) As to the orders of the Court giving leave for requisition, and the release and delivery of ships and cargoes made thereunder, it was argued that the right of requisition which is exercised under Order XXIX. is derived from municipal law only and does not bind foreign States and their subjects. As to the Treaty of Versailles, the case was made that the rights of the Sovereign of Holland in the ships and cargoes in question are independent of the rights of the German owners and are not affected by a Treaty to which Holland was not party, even though the rights of the German owners should be held to be so affected.

In respect of the ships sunk by enemy action, counsel for the claimants contended that the risk of loss by such means was accepted by the Crown upon obtaining delivery by process of requisition, and that the value of the ship in each case with a fair recompense for its user must be awarded against the Crown.

Application was made for an opportunity of considering whether the appraisements made under the order of the Court represented the true values; but to this application, made for the first time at the hearing, more than two years

(1) 5 C. Rob. 15. (2) [1919] P. 245.

(3) Ante, p. 81.

1920

THE PELLWORM.

The President.

after the appearance of the claimants, and without any apparent ground for challenging either the regularity or the correctness of the appraisements, I thought I ought not to accede.

As to the vessels in the possession of the Admiralty as well as those sunk by enemy action, counsel for the Procurator-General relied on the orders of the Court under Order XXIX. as orders which vested the ships in the Crown for all purposes. The claim for payment on account of user they resisted as inconsistent with the order for requisition, and, in substance, a claim for damages. Counsel informed me that in *The Düsseldorf* (1) a like claim was made and was disallowed by Lord Sterndale. Apart from the Treaty of Versailles, it was contended on the part of the Crown that at any rate as to the two ships still in its possession the order properly consequential upon Lord Sterndale's interlocutory decree would be an order for payment out to the claimants, on behalf of the German owners, of the sums undertaken by the Procurator-General to be paid as a term of the requisitions. The wrongful destruction of the ships sunk by submarines was however alleged as an answer to any German claim in respect of these ships, and the Treaty was relied upon as an answer to any claim made in respect of German property or interests. Counsel maintained also that a neutral State claiming restitution of prize taken in its territorial waters claims only as a trustee for the owner of the property seized.

The case depends mainly, I think, upon the question whether a neutral state claiming a vessel captured in its territorial waters claims in respect of an interest of its own or solely in assertion of its sovereignty and of the rights of the disseised owner. If the seizure creates a proprietary right in the ship on the part of the neutral Sovereign that right must be safeguarded by the Court. If the only proprietary right at the time of the seizure and of the claim in prize is that of the owner, cesser of that right pending the suit prevents any decree of restitution for the use of

(1) [1919] P. 245.

the owner. The only encroachment which was made upon the rights of the owner by the seizure here in question was the subtraction from them of an inchoate right of prize on the part of the captor. Nothing done then or later by captor or owner seems of itself to found a claim of interest in the neutral State whose territory was violated by the seizures.

The case for the claimants was supported by reference to cases like *The Anne* (1), *The Bangor* (2) and *The Düsseldorf*. (3) The statement of Story J. in giving judgment in *The Anne* (1) is in these words: "A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral Sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral Sovereign omits or declines to interpose a claim, the property is condemnable, jure belli, to the captors."

The argument for the claimants assumes that the right of the neutral State which is asserted by Story J. is a right coupled with an interest. There is no decision to this effect, so far as I know. In the recent cases in this Court the question did not directly arise, though on examining the decree in the *Düsseldorf* (3), where H.M. the King of Norway was claimant and restitution of a German-owned ship was ordered, I find the direction in the decree to be "that the said steamship be handed back by the Crown to the Marshal and forthwith released by him to Messrs. Waltons & Co. on behalf of the said claimant." The words are perhaps capable of a meaning consistent with the existence of a special interest in the claimant—an interest which it would be an act of grace on his part to yield up to the disseised owner. The proposition that there is such an interest can be tested by applying the rule of international law as it is stated by Lord Stowell in the often cited case of *The Vrow Anna Catharina* (4): "When the fact [of capture in neutral waters] is established it overrules every other consideration. The capture

(1) 3 Wheat. 435, 447.
(2) [1916] P. 181.
(3) [1919] P. 245.
(4) 5 C. Rob. 15, 16.

1920

THE PELLWORM.

The President.

is done away with; the property must be restored." "Do away with the capture" and you extinguish the right in prize of the captor. "Restore the property" and it revests in the former owner. It cannot revest in the neutral claimant, for it never was vested in him. This conclusion is supported by the forms of the entries, which I have seen, in the Assignation Book of the Admiralty of the decrees in some well-known cases. For example in *The Twee Gebroeders* (1) heard in 1800, the claimant on behalf of the King of Prussia, alleging a seizure of a Dutch ship in Prussian territorial waters, was Sebastian Friday "intervening and claiming the said ship and cargo." The Registrar's note of this decree is that "the Judge pronounced the ship to have been captured and seised in violation of the territory of His Majesty the King of Prussia . . . . and decreed the same to be restored to the said claimant *for the use of the owners and proprietors thereof.*" In *The Anna* (2), decided in 1805, the claimant was Mr. Lyman, acting on instructions of the United States Government, and the ship, cargo and specie were decreed to be restored to him "for the use of the owners and proprietors thereof."

In point of principle I see no ground on which it can properly be supposed that the neutral sovereign in a case like the present asserts a right of property other than that of the enemy owner, and I think the authorities show that he does not. Because of his enemy character the enemy owner can maintain no claim, but when the neutral sovereign appears to demand restitution he demands it for the use of the enemy owner.

What is next to be determined is whether the orders of the Court authorizing the requisitions which were made by the Crown were effectual to change the property in the ships and cargoes, that is to say to vest the same in the Crown. That depends upon two things: the intent of the Rules under which the requisitions were made, and the validity of them in point of international law. Order XXIX. provides for permanent and for temporary requisitions; having regard to

(1) (1800) 3 C. Rob. 162. (2) (1805) 5 C. Rob. 373.

the definition in Order I., r. 2, it includes both ships and goods, and the process by which it is carried out is that of "release and delivery" to the agents of the Crown. Requisitioned goods are certainly delivered for consumption. Ships are delivered for purposes which involve certain destruction in some cases—as for example sinking in waterways for defensive purposes—and great risk of destruction in most other cases. Looking at the Order as a whole I think its intent is that ships and goods requisitioned shall become the property of the Crown, and for all purposes of the jurisdiction in prize shall thenceforward be represented by the appraised values.

The judgment of the Privy Council in *The Zamora* (1) determines the conditions under which the power of requisition can be exercised so as to bind the rights of persons not subject to our municipal laws. Applying the rules there stated I find that the vessels and goods here in question were urgently required for the defence of the realm; there was a real question to be tried in prize as between captor and claimants; and the determination of the Court that the right of requisition was exercisable was a judicial determination. On the whole therefore I hold that the orders for the requisitions and the release and delivery made thereunder vested in the Crown the property in these ships and cargoes.

Once it is held that the ships were vested in the Crown the sinking of some of them by enemy action after requisition is, I think, an irrelevant matter. Neither the claimants nor the owners are barred by it, in respect of a claim upon the funds which result from the requisitions, and neither of them was an actor in the lawless transactions by which these ships were destroyed.

The demand of the claimants for payment by way of recompense for the use of the several ships since they were requisitioned is disposed of, so far as this Court is concerned, by what I have already said. Not only had the claimants no property of their own in respect of which such a claim

(1) [1916] 2 A. C. 77, 106.

1920

THE PELLWORM.

The President.

could arise; the property was in the Crown when the user in question occurred. I need not consider whether this claim was in reality a claim for damages transformed as was said for the Crown by something akin to waiver of tort into a money claim under an implied obligation. At any rate no award can be made.

Apart from the Treaty of Versailles the result as to the four ships of the conclusions I have stated would be a decree for restitution in value by payment over of the four appraised amounts to the claimants for the use of the respective owners. What is the effect of the Treaty? The distinction between ships of 1600 tons and upwards and ships of under 1600 tons becomes immaterial. The subjects of the claim now are four sums of money payable to a neutral sovereign for the use of German owners. The Treaty purports to transfer to the Crown all property and interests in the United Kingdom belonging to German subjects at the date of the coming into force of the Treaty, and the beneficial interest in these sums is I think within the class of things transferred. I cannot doubt that a neutral assignee of one of the shipowners would have had as good right as his assignor to the beneficial interest of his assignor under a decree. There being no property or beneficial interest in the claimant, the neutral Power, the fact that that Power is no party to the Treaty seems to me to be immaterial. The ratification of the Treaty by the sovereign authority of the signatory Powers gives it binding effect as against their respective subjects, and none the less so because ratification was subsequent in date to the material events in the cause, including the interlocutory decree. The view which I take of this matter is I think based upon identical considerations with those which underlie the judgment of the United States Supreme Court in *United States* v. *Schooner Peggy*. (1) Marshall C.J. stated the governing principle in these words: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court,

(1) (1801) 1 Cranch, 103, 110.

1920

THE PELLWORM.

The President.

as an act of Congress." The treaty there in question operated to divest by certain of its general provisions rights of a captor which had been established in a Court of first instance before the date at which the treaty took effect. In the present case effect must be given to the relevant articles of the Treaty of Versailles.

In the events that have happened the proceeds of the four ships must be retained to be dealt with pursuant to the Treaty.

Consideration of the claims relating to the cargoes must be reserved until the facts have been more fully ascertained.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the Dutch Government: *Ince, Colt, Ince & Roscoe.*

Solicitors for the Shipowners and Cargo Owners: *Waltons & Co.*

E. C. T.

[DIVORCE.]

1920]

April 23.

PERRY *v.* PERRY.

Husband and Wife—Marriage—British Colony—Evidence—Church of England Marriage—Ecclesiastical Certificate—Expert Evidence of Colonial Law.

A marriage, celebrated in a British colony according to Church of England usage, may be proved by the production of a certificate of an entry in an ecclesiastical register, signed by one of the clergy of the church in which the register is kept, without expert evidence of the validity of the marriage or the certificate according to local law.

WIFE'S petition for restitution of conjugal rights. The case was undefended. The only evidence of the marriage produced was a copy, certified by an assistant priest of St. George's Cathedral, Cape Town, in the Cape Colony, of an entry made in the register kept in the cathedral, that the marriage was celebrated in that cathedral according to the rites of the Church of England.

1920

PERRY v. PERRY.

No expert evidence was tendered of the validity of the marriage or of the evidence according to the local laws of the colony.

Durley Grazebrook for the petitioner. The case is covered by *Ward* v. *Dey* (1), cited and followed in *Browning* v. *Browning*. (2) *Wallace* v. *Wallace* (3) is an authority to the same effect.

HORRIDGE J. I do not think that *Wallace* v. *Wallace* (3), on which the decision in *Browning* v. *Browning* (2) seems to have turned, is really of assistance, for that case depended on statutes relating to Ireland; but in *Browning* v. *Browning* (2) Lord Coleridge also refers to *Ward* v. *Dey* (1), and as that case deals with a marriage according to Church of England usage in a colony, I think I can accept it as an authority for admitting the certificate tendered as evidence in the present case.

Solicitors: *Lawrence & Mavro.*

(1) (1846) 1 Rob. E. 759. (2) [1919] W. N. 28.
(3) (1896) 74 L. T. 253.

J. R. B.

[ADMIRALTY.]

1920

May 11.

(In Prize.)

THE OSCAR II.

[1916. No. 933.]

Prize Court—Enemy Property—Sale to Neutral Purchasers—Payment out of Proceeds—Reprisals Order in Council of March 11, 1915—*Treaty of Versailles, art.* 297.

Under the Reprisals Order in Council of March 11, 1915, "to restrict further the commerce of Germany," non-contraband goods which were enemy property might be detained or sold, and if sold the proceeds were to remain in Court until the conclusion of peace or further order.

In December, 1915, a neutral vessel bound for Copenhagen, and having on board a consignment of clover seed, called at a British port where the clover seed was ordered to be seized as prize. The vessel, however, was allowed to proceed on her voyage without discharging the seed on her owners giving an undertaking that the seed should be returned to be placed in the Prize Court. In March, 1917, the claimant, a neutral trader of Copenhagen, with knowledge that the goods or their proceeds had to be returned to be placed in the Prize Court, bought the seed from the Copenhagen agent of the owners, a German firm in Hamburg, and paid for it, and in addition paid into Court, as the condition of the release of the goods to him, a sum of 3638*l.* 10*s.* 11*d.* In March, 1919, the Court declared the goods at the time of seizure to have had an enemy destination and to be enemy property, and ordered the detention of the proceeds until the conclusion of peace or further order.

Under art. 297 of the Treaty of Peace signed at Versailles and ratified on January 10, 1920 (1), property in British or Allied territory which at the time of the coming into force of the Treaty belonged to German nationals is liable to be retained and liquidated.

On the claimant's application for the payment out of Court of the proceeds on the ground that they were only subject to detention until the conclusion of peace :—

Held, that the Order in Council did not have the effect of depriving the enemy owner of goods detained under the Order of the right of disposing of his interest in the goods, and that, as the owner had disposed

(1) Para. (*b*) . . . the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates. . . . .

1920

THE OSCAR II.

of his interest, the proceeds at the date of the ratification of the Treaty were not enemy property, and, accordingly, that the claimant was entitled to an order for payment out.

MOTION for payment out of Court of the proceeds of sale of goods declared to be enemy property under the Reprisals Order in Council of March 11, 1915.

The claimant, Peter M. Kaae, a merchant of Copenhagen, claimed the payment out to him of 3638*l.* 10*s.* 11*d.*, which had been paid into Court under the following circumstances: In December, 1915, a consignment of clover seed, shipped on the steamship *Oscar II.* by a New York firm to one Herman Lindberg, at Malmo, was seized as prize when the vessel put into Kirkwall, but to avoid delay she was allowed to proceed on her voyage without discharging the consignment on her owners giving an undertaking that it should be returned to a British port to be placed in the Prize Court. Instead of having the consignment returned the British Government allowed it to be sold in Copenhagen on condition that the proceeds were remitted and placed in prize.

In March, 1917, the claimant purchased the clover from one Rasmussen, who held the bills of lading and was understood by the claimant, according to his affidavit, to be acting on behalf of Mr. Lindberg. Rasmussen in fact, however, was the agent of the real owners, a German firm in Hamburg. The claimant paid Rasmussen 42,000kr. for the goods, and in addition paid into Court 52,919kr. (3638*l.* 10*s.* 11*d.*) as a condition of their release and as representing the proceeds. On January 11, 1918, by an amendment to a writ which had been issued on February 9, 1916, in respect of other parcels of cargo on the *Oscar II.*, the Crown claimed the condemnation of the proceeds as contraband of war, or alternatively an order for detention under the Reprisals Order in Council as being the proceeds of goods which had an enemy destination and were enemy property. The claimant did not appear at the hearing before Lord Sterndale on March 21, 1919, when the release of the goods or their proceeds was claimed by the shippers, who claimed as unpaid vendors. Lord Sterndale dismissed the shippers' claim with costs; declared the

goods at the time of seizure to have had an enemy destination and to be enemy property; and ordered the proceeds to remain in Court until the conclusion of peace or further order.

On May 1, 1920, the claimant set down the present motion for an order for payment out. The Crown resisted the motion on the ground that the goods had been declared to be enemy property; that the proceeds represented the goods; and that as such, under art. 297 of the Treaty of Peace signed at Versailles, as a fund belonging to German nationals it was subject to be retained and liquidated, and, in accordance with the provisions of the Annex thereto, administered for the benefit of British subjects having debts owing to them by German nationals.

Sir Gordon Hewart A.-G. and *J. Wylie* for the Procurator-General.

R. H. Balloch for the claimant.

THE PRESIDENT (SIR HENRY DUKE). This is a claim by Peter M. Kaae, a trader of Copenhagen, a Danish subject, for payment out to him of a fund in Court of between 3000*l.* and 4000*l.*, which represents 52,919kr. paid into Court as a condition of the release to him of 350 bags of Alsyke clover seed. The goods had been seized in course of transit from New York to Malmo in December of 1915. By an amendment dated January 11, 1918, to a writ in prize which had been issued by the Procurator-General in February of 1916 the Procurator-General claimed condemnation of the goods as prize, or alternatively detention under the Reprisals Order of March 11, 1915. That cause of condemnation was pending until March, 1919, when it came to trial. A claim had been interposed on behalf of a firm in New York, Herbst Bros. & Co., who claimed to be the owners of the goods which had been consigned by Bushnell & Co., a firm of forwarding agents, to Herman Lindberg. In March, 1917, when the cause was pending on the claim of the Procurator-General for condemnation or detention, the claimant, under the

1920

THE OSCAR II.

The President.

circumstances stated in his affidavit, purchased whatever property there was in the vendor of these goods, one Rasmussen, and purchased them at a price of 42,000 odd kr. It is said quite truly on the part of the Crown that he took his chance—if the goods were subject to condemnation as prize he lost his money; if the goods were not subject to condemnation as prize, but were liable to the fate which awaited goods by virtue of the clauses of the Reprisals Order of March, 1915, then his ultimate right to demand delivery of the goods—or of the fund which he brought into Court to be the substitute for the goods—must depend upon the proper effect of the Reprisals Order on a transfer of goods brought in under that Order, and purchased, after being brought in, by a neutral claimant. No question has been raised that the claimant honestly bought the rights of his vendor in the 350 bags of clover seed; and that—subject to the effect of the Reprisals Order in Council, of the judgment of Lord Sterndale at the hearing of the cause, and of the provisions of the Treaty of Peace—the purchase by the claimant was effectual to transfer to him such rights as his vendor could transfer at the time of the transaction. I dwell upon this part of the matter because it has been made clear to me on the part of the Crown that what is desired in this case is not to defeat the claim upon some collateral ground, but to have the question decided as to what is the effect of the Treaty of Peace upon such a purchase as has been made by the claimant in this case. I therefore limit what I propose to say to that question, and I put aside all collateral questions which might conceivably have arisen.

I have to consider first of all what was the effect of the Reprisals Order? That is necessary in order to see what was the right of an enemy owner of goods at the date, March, 1917, when the owner of these goods, whom I must take to have been an enemy owner, sold them to the present claimant. The Reprisals Order of March, 1915, does not appear to me to be designed, of its own effect, to divest any enemy of his property. It leaves rights in prize to be determined in prize—questions of enemy goods under an enemy flag, enemy

1920

THE OSCAR II.

The President.

goods captured by various means, contraband, and all questions of that kind it leaves where it found them. But it makes provision for the lawful interception of goods coming from German ports which are enemy property, and of goods proceeding to German ports, and it provides with regard to vessels sailing from ports other than German ports, after March, 1915—and having on board goods which are enemy property, that such vessels may be required to discharge their goods in a British or Allied port; that the goods so discharged are to come into the custody of the Marshal; if they are not requisitioned they are to be detained or sold, and if sold the proceeds are to be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just. Then there is this proviso, that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace, except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of the Order. I do not find anything in the terms of the relevant articles of the Reprisals Order which purports to divest enemy property or subject it to confiscation. It provides for detention, and it creates the jurisdiction in the Prize Court to deal with detained enemy goods in the way in which goods brought in as prize may be dealt with in a Prize Court; but it leaves the ownership in those goods as it found the ownership. It subjects the goods to be detained and to be kept in Court, or their proceeds to be detained and kept in Court, and neither the goods, nor the proceeds, are to be parted with except upon the application of the Crown, or with the consent of the Crown. That was the state of affairs as to these 350 bags of clover seed when the present claimant made his purchase from Rasmussen. Rasmussen represented the owners of goods lawfully detained in this country until the close of the war. The claimant purchased their interest in those goods. Everything Rasmussen could grant to the claimant he got; Rasmussen was not disabled by any means known to British law, or to international law, from making his bargain with the claimant. That was the event of March, 1917.

1920

THE OSCAR II.

The President.

In March, 1919, as I have said, the cause of condemnation instituted by the Procurator-General, with the claim raised in it by Herbst Brothers, came on for determination. There was no condemnation, and condemnation was not then sought, so that these goods were not prize, and were not confiscated. But there was a decision that the 350 bags of clover seed (identifying them) had an enemy destination, and they were pronounced to be enemy property. It is suggested that that decree determined some question relevant to the issue which I have to determine. In my judgment, the decree determined only that at the time when these goods were seized and brought in they were enemy property. That clearly was the intention of my predecessor, Lord Sterndale, as appears from the language used by him in delivering his judgment. It not only was his intention—it was the necessary limitation of the judgment—because the only question which had to be decided was whether, when these goods were seized and brought in, they were enemy property, and that was determined. The decree of March 21, 1919, does not, in my judgment, determine any question which comes before me to be decided. I have, therefore, these facts : goods detained under the Reprisals Order adjudged to be properly held under the Reprisals Order and adjudged to have been, at the time of seizure, enemy property ; and, pending the determination of the Court, a sale by the enemy owner to a neutral purchaser—the claimant.

It is to that state of facts that I have to apply the terms of the Peace Treaty, and, in particular, of art. 297. If the fund at the time of the Peace Treaty had been the property of any German subject art. 297 would have been effective to transfer all proprietary interests in it to His Majesty the King. Art. 297 effectually provides by Treaty between the Sovereign Power of Germany and the Sovereign Powers of the United Kingdom and her Allies, that assets such as this fund, which belong, at the time of the coming into force of the Treaty, to German nationals, or companies controlled by them within the territories, colonies, possessions and protectorates of the Allied Sovereigns, shall vest, for the purposes named in the

1920

THE OSCAR II.

The President.

Treaty, in the respective Allied Sovereigns. The goods are claimed by the Crown as having passed under the Treaty. It is said however by Mr. Balloch on the part of the claimant, that, when the limitation in the Treaty is examined, this fund, the proprietary interest in which had been purchased by a neutral purchaser in 1917, clearly was not property, rights or interests, belonging at the date of the coming into force of the Treaty to German nationals. I have examined the question whether the effect of the Reprisals Order was to divest the original German owner of this fund of his right of disposal of it; and, in my opinion, as I have said, it was not. I have examined the judgment of Lord Sterndale to ascertain whether he had made any determination which affects this claim, and I am satisfied that he had not. I now have examined the Peace Treaty, and I am satisfied that this fund is not within the description of "property," "rights" and "interests," which are dealt with by art. 297, s. (*b*), of the Peace Treaty. It was not a fund belonging to a German national at the time there named. This, therefore, is a fund which ought to be paid out of Court to the claimant.

Solicitors for the claimant: *Botterell & Roche.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. T.

1920

May 11.

[DIVISIONAL COURT.]

[ADMIRALTY.]

THE TURID.

[1919, fol. 889.]

Admiralty—Charterparty—Custom of Port—Custom inconsistent with Charterparty—"Cargo to be taken from alongside at charterers' expense as customary"—Exclusion of Evidence of Custom throwing Expense on Shipowner.

The defendants, timber merchants at Yarmouth, chartered the plaintiffs' vessel to carry a cargo of timber to Yarmouth. Under the charterparty the vessel had to deliver the cargo at Yarmouth "always afloat . . . . cargo to be . . . . taken from alongside the steamer at charterers' risk and expense as customary." To lie "always afloat," the vessel could not come within about thirteen feet of the quay, and in such a case the custom of the port was to erect a wooden staging between the ship and the quay, and for stevedores employed by the ship-brokers to carry the cargo for the shipowners from the ship's rail over the staging and to put it down 10 or 12 feet from the edge of the quay. The custom further was that the whole of the work was carried out at the expense of the shipowners.

The plaintiffs objected that the custom was inconsistent with the provision in the charterparty that the charterers had to take the cargo from "alongside" at their expense, and brought an action in the Yarmouth County Court to recover the difference between the cost of the whole of the work and the rate for delivery at the ship's rail. The county court judge found in favour of the plaintiffs and the defendants appealed:—

Held, following *Holman* v. *Wade* [*The Times*, May 11, 1877] that the custom was inconsistent with the charterparty and that the plaintiffs were entitled to succeed.

Appeal by the defendants, the charterers of the steamship *Turid*, in an action for damages for breach of charterparty, against a decision of the judge of the County Court of Norfolk, holden at Great Yarmouth, in favour of the plaintiffs, the owners of the vessel.

By charterparty dated October 1, 1914, it was agreed that the plaintiffs should load on their steamship *Turid* at Soroka and thence carry for the defendants, Palgrave, Brown & Son,

1920

THE TURID.

Ld., timber merchants of Great Yarmouth, a cargo of deals, battens, boards and short ends to Great Yarmouth as ordered, "always afloat." By clause 3 of the charterparty it was, inter alia, provided that the cargo should be "loaded and discharged . . . . as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports but according to the custom of the respective ports. . . . . The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." The *Turid* arrived at Great Yarmouth with the defendants' cargo on November 8, 1914, but was unable on account of her draught to come nearer to the quay than 12 to 13 feet. Under such circumstances the custom of the port was that a wooden staging should be erected between the ship and the quay, and that stevedores employed by the shipbrokers as agents for the shipowners should carry the cargo from the ship's rail over the wooden staging and dump it at not less than 10 feet from the quay edge, and that the cost of so discharging the cargo and erecting the staging should be borne by the shipowners. The plaintiffs under protest carried the cargo from alongside over the staging erected by the defendants and stacked the cargo on the quay, whereby additional expenses were incurred amounting to 46*l.* 17*s.* more than if the plaintiffs' obligation had ceased at the ship's rail. The plaintiffs claimed to recover these expenses from the defendants on the ground that the custom was inconsistent with the express term of the charterparty which required the defendants to take the cargo from alongside at their own risk and expense. The county court judge upheld the plaintiffs' contention. The defendants appealed.

McKinnon K.C. and *Harney K.C.* for the appellants. By the custom of the port these expenses fall on the shipowners. The custom is not disputed by the respondents, and it does not contradict the terms of the charterparty. "Alongside" can have an enlarged meaning by custom: *Aktieselkab Helios* v. *Ekman* (1); *Stephens* v. *Wintringham* (2); see also *Glasgow*

(1) [1897] 2 Q. B. 83 [*qu.* should read "Aktieselskab".].
(2) (1898) 3 Com. Cas. 169.

1920

THE TURID.

Navigation Co. v. *Howard.* (1) In the case relied on by the respondents, *Northmoor Steamship Co.* v. *Harland & Wolff* (2), in which the decision of the Court of Appeal in *Holman* v. *Wade* (3), reported only in *The Times*, was discussed, the vessel could not get within 50 feet of the quay, and it was held that such a distance could not be said to be alongside. In *Holman* v. *Wade* (3) the issue between the parties appears to have been a question as to who should bear the additional cost of stacking. Both those cases therefore are distinguishable. The present case is covered by the decision of Bigham J. in *Stephens* v. *Wintringham* (4), where, the vessel being alongside the quay, it was held that a vacant space on the quay some 70 feet away from the ship's side was still "alongside," and that the merchants' obligation to receive the cargo from alongside only arose after it had been brought to that space. *The Nifa* (5), in which the charterparty was very similar to the present one except that in that case the words "as customary" occur only once, merely decides, in effect, that if the cargo is no longer "alongside" evidence of the custom is inadmissible. The whole question is at what point does "alongside the ship, always afloat" begin. It is agreed that the discharge was to be at the defendants' expense, but only after that point was reached, and by custom it was reached at a place on the quay which in actual distance was less than, in the case of a big ship, the vertical distance from the ship's rail to a lighter alongside.

[*Brenda Steamship Co.* v. *Green* (6) was also referred to.]

Raeburn K.C. and *Trapnell* for the respondents. If the appellants are right, then although the delivery from alongside is "at charterers' expense," in fact the shipowners would be paying the whole cost of the delivery. Ten to twelve feet from the quay was as near as the *Turid* could get "always afloat." That, therefore, was the end of her voyage and there the charterers had to receive the cargo. The appellants' contention is wholly inconsistent with the meaning of

(1) (1910) 15 Com. Cas. 88.
(2) [1903] 2 I. R. 657.
(3) "The Times," May 11, 1877.
(4) 3 Com. Cas. 169.
(5) [1892] P. 411.
(6) [1900] 1 K. B. 518.

the word "alongside." In no case except *Stephens* v. *Wintringham* (1) has the meaning of "alongside" been extended to a spot which was not actually alongside the ship, and in that case, in which the meaning was somewhat strained, the ship herself was alongside the quay. By custom the ordinary meaning of delivery alongside—i.e., at the ship's rail—can be extended to delivery and stacking into a lighter alongside, as in *Glasgow Navigation Co.* v. *Howard* (2), but that is the limit of the extension. The case is covered by the decisions in *Holman* v. *Wade* (3) and *The Nifa* (4), which latter case in effect overruled *Scrutton* v. *Childs* (5): see the observations of A. L. Smith J. and Carver's Carriage of Goods by Sea, 6th ed., s. 250. *Holman* v. *Wade* (3) was discussed and followed by Palles C.B. in *Northmoor Steamship Co.* v. *Harland & Wolff.* (6) In *Aktieselkab Helios* v. *Ekman* (7) the lighter was in fact alongside the ship, and further the claim was in respect of demurrage. The decision therefore is not in point. The words "as customary" only refer to the manner of discharge: cf. *The Nifa* (4); if they refer to the expense of the discharge the custom of the port is utterly inconsistent with the charterparty and evidence of the custom is therefore inadmissible.

[Reference was also made to *Hayton* v. *Irwin* (8), and *Metcalfe, Simpson & Co.* v. *Thompson.* (9)]

McKinnon in reply referred to *Cardiff Steamship Co.* v. *Jameson.* (10)

Cur. adv. vult.

May 17. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: The appellants are timber merchants at Great Yarmouth. The respondents are the owners of the Norwegian steamship *Turid.* The appellants chartered the *Turid* to bring a cargo of timber from Soroka to Yarmouth, and the parties are at issue as to who is liable under the

(1) 3 Com. Cas. 169.
(2) 15 Com. Cas. 88.
(3) "The Times," May 11, 1877.
(4) [1892] P. 411.
(5) (1877) 3 Asp. M. L. C. 373.
(6) [1903] 2 I. R. 657.
(7) [1897] 2 Q. B. 83.
(8) (1879) 5 C. P. D. 130.
(9) [1902] 18 Times L. R. 706.
(10) (1903) 9 Asp. M. L. C. 367.

1920

THE TURID.

The President.

charterparty to pay certain expenses of the discharge of the cargo. By the charterparty it was agreed that the *Turid* should load at Soroka and proceed with the cargo to Yarmouth and deliver the same "always afloat." . . . . The "cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The draught of the *Turid* was such that to be afloat at Yarmouth she could not come within about 13 feet of the quay side at which she was to discharge. The usual method of unloading for a ship so situated is to erect stagings between the ship's side and the edge of the quay, abreast of the several holds, such stagings being constructed of baulks of timber carried from the quay to the ship's side at a level of 4 or 5 feet below the rail with planks resting upon the baulks. The *Turid* had three holds, and three stagings were erected. At each staging one gang of men carried the timber to the ship's rail and another gang received it there, carried it ashore, and stacked it at a distance of some 12 feet from the face of the quay. Stacking of timber nearer the water side was not permitted, as free passage-way had to be kept there. The cost in question was the cost of erecting the stagings, carrying the timber across the stagings and across the 10 or 12 feet of quay, and stacking it.

Before the learned judge in the county court proof was given of a custom of the Port of Yarmouth that the whole of this work should be done by, and at the cost of, the ship. It was objected, on the part of the shipowners, the plaintiffs, that the alleged custom was inconsistent with the terms of the charterparty, and the learned judge took this view, and gave judgment in their favour for the sum in dispute. The defendants appeal against this decision upon the one question of whether the alleged custom is consistent with the terms of the contract. If it is, the evidence was admissible, and as it was uncontradicted there should be judgment for the defendants.

The appellants agreed to take delivery of their timber from alongside the steamer, lying afloat, at their own risk and expense as customary. The express qualification as to custom

appears to relate to the mode of taking delivery, and not to the mode of meeting risk or bearing expense. The custom of the port will govern the mode of delivery if it is consistent with the express agreement. What has to be determined is whether the claim of the appellants to have a staging erected for them between the ship and the quay and to have the timber stacked on their ground at the landward side of the 12 feet of clear frontage is consistent with their agreement to take delivery from alongside.

Although delivery alongside is in the primary meaning of the words delivery at the ship's rail, custom may undoubtedly give to the term an enlarged meaning. The shipowners may by force of custom be required to deliver into a lighter alongside or a quay alongside. The limitation put by law upon such a customary requirement is that it shall be reasonably consistent with what has been agreed. In the present case I should have thought, apart from authority, that what is demanded of the shipowners is not reasonably consistent with the agreement of the parties. The quay was not alongside; the merchants' men could only come alongside by coming upon the staging. It is necessary, however, to examine some of the authorities which were cited as conclusive of the question at issue and in particular the decisions of the Court of Appeal in *Holman* v. *Wade* (1), decided in 1877, and *Aktieselkab Helios* v. *Ekman* (2), decided in 1897.

Holman v. *Wade* (1) is reported only in *The Times* newspaper, but was a considered judgment upon a state of facts and a charterparty very like those in the present case. The words of the charterparty were these: "Cargo to be brought to and taken from alongside the ship at the merchants' risk and expense as customary." Owing to the form of the report in *The Times*, some doubt has arisen as to the exact character of the expenses which were in dispute, and Mr. Carver, in his excellent work on Carriage by Sea, describes them as expenses of stacking. We have examined the record which is in the Public Record Office and which puts the scope and result of the litigation beyond question. The plaintiffs

(1) "The Times," May 11, 1877. (2) [1897] 2 Q. B. 83.

1920

THE TURID.

The President.

were the shipowners suing upon a charterparty for carriage of a cargo of timber from Riga to Hull, which provided that the vessel being loaded at Riga should proceed to the consignees' quay, Victoria Docks, Hull, or so near thereto as she might safely get and deliver the same always afloat for the agreed freight; "the cargo to be brought to and taken from alongside the ship at merchants' risk and expense as customary." The action was brought for breach of contract; the alleged breaches being that defendants did not and would not (*a*) take the cargo from alongside the ship at their own expense as customary within the true intent and meaning of the charterparty, and (*b*) discharge the cargo as fast as the steamer could deliver it. The averments of damage were that the plaintiffs were forced and obliged to discharge the cargo at their expense and to stack the same on the defendants' quay, whereby they incurred expenses amounting to 11*l.*, and the ship was delayed two days with consequent loss to the plaintiffs of 60*l.* The defendants by their defence alleged a custom at Hull for ships laden with timber to discharge their cargo upon the quay alongside, and to continue the discharge as long as there is quay space vacant for the discharge, the cargo then to be taken from alongside by the consignees. Defendants alleged further that the plaintiffs' loss of time was due to their having "at first" refused to discharge the cargo as customary, and that the subsequent discharge of the cargo had been made in the customary manner. Plaintiffs by their reply joined issue and demurred to the pleas as to custom on the ground that the alleged custom was contradictory of the charterparty. The action was tried before Manisty J. and a City of London jury. The evidence, as stated in *The Times*, showed that at the quay in question it was necessary, in order to unload deals, to construct a stage from the quay to the ship, and as the deals were landed to stack them, and that this had involved, with regard to the cargo in question, the expenses amounting to 11*l.*, which the plaintiffs claimed. Evidence was also given of a custom at Hull that these expenses should be borne by the shipowners. The amount

1920

THE TURID.

The President.

of the damages was agreed at 71*l.* Manisty J. directed that judgment should be entered for the plaintiffs on the ground that the custom was inconsistent with the contract. The defendants' appeal was heard before Lord Coleridge C.J., Bramwell and Brett L.JJ. Mr. Day (afterwards Day J.) appeared for the plaintiffs, and Mr. Butt (afterwards Sir Charles Butt, President) for the defendants; and after consideration the judgment of the Court was delivered by Bramwell L.J. on May 10, 1877. On the ground that the contract could not be varied by custom the appeal was dismissed.

In this present case the facts and the contract are as nearly as can be alike with the facts and contract in *Holman* v. *Wade* (1), and the judgment in that case seems to be directly in point.

We were invited to consider some cases subsequent to *Holman* v. *Wade* (1) which were cited by the respondents as expressions of the principle there explained. *Hayton* v. *Irwin* (2) was a claim under a charterparty for a voyage to Hamburg in respect of expense thrown on the shipowner by the charterers' refusal to take delivery at a point in the Elbe short of Hamburg. The charterparty required the ship to proceed "to a safe port or as near thereto as she can safely get and deliver cargo . . . . and to discharge as customary with all dispatch." The vessel could go no nearer to Hamburg than Stade without being lightened. The charterers refused to take delivery at Stade or to pay the costs of lightening the ship there, and the shipowner sued for the expenses thus thrown upon him. The defendants pleaded a custom of Hamburg whereby they were only bound to take delivery there, and the expense of lighterage for lightening the ship at Stade was payable by the plaintiff. Grove J. allowed a demurrer to the defence, and Bramwell, Brett and Cotton L.JJ. affirmed his decision on the ground that the terms of the contract excluded the custom.

The Nifa (3) was heard in this Court on appeal from the

(1) "The Times," May 11, 1877. (2) 5 C. P. D. 130.
(3) [1892] P. 411.

1920

THE TURID.

The President.

county court at Yarmouth. The shipowners sued the charterers for expenses of the same kind as the expenses here in question, caused by the same conditions at the Yarmouth quays which are described in this case—staging, carriage across the quay, and stacking. The mode of discharge was the same. The claim of the shipowners for the expenses of delivery of the cargo in excess of expense of delivery at the ship-rail was met by a plea of the custom which is alleged in this case. Upon proof of the custom the county court judge gave judgment for the defendants. On appeal the Divisional Court in Admiralty (Sir Francis Jeune P. and A. L. Smith J.) reversed the judgment, on the ground that the custom was contrary to the plain meaning of the printed contract. The material provision in the charterparty was in these words: "Cargo to be supplied . . . . and discharged as fast as steamer can deliver and according to the customs of the respective ports." The decision is in point here.

The appellants relied before us upon *Stephens* v. *Wintringham* (1), *Aktieselkab Helios* v. *Ekman* (2), and *Glasgow Navigation Co.* v. *Howard.* (3)

In *Stephens* v. *Wintringham* (4) the charterparty required that the cargo should be "taken from alongside at merchant's risk and expense according to the custom of the port." The ship berthed alongside the quay and the space available for receipt of the cargo by the merchants was 60 or 70 feet distant from the ship's side; the custom of the port was that the shipowner should bear the cost of delivery at that space and of the dumping there which was necessary in order that the prompt discharge of the ship might proceed; and Bigham J. held that the merchants' duty to receive the cargo arose only when it had been dumped at that place.

In *Aktieselkab Helios* v. *Ekman* (2) the charterparty for carriage of a cargo of deals on board the plaintiffs' vessel from Ramock to one of the usual wood docks in the river Thames provided for the deals to be "brought to and taken

(1) 3 Com. Cas. 169.
(2) [1897] 2 Q. B. 83, 87, 89.
(3) 15 Com. Cas. 88.
(4) [1892] P. 411.

from alongside the ship at merchant's risk and expense." At the trial before Collins J. evidence was received of a custom of the Port of London for delivery into lighters alongside, the ship bearing the cost of putting the timber into the lighter. The learned judge held that the custom was not inconsistent with the contract and gave effect to it by his judgment, and upon appeal to the Court of Appeal, before Lord Esher M.R., A. L. Smith and Chitty L.JJ., the judgment was affirmed. The decisions in *Holman* v. *Wade* (1) and *The Nifa* (2) were cited, and Mr. Joseph Walton, who argued for the respondents, appears to have accepted the principle on which they proceed. Lord Esher in his judgment pointed out that the consignee in fact took delivery alongside. He said: "It is part of the operation of taking delivery of the cargo that the consignee or merchant should provide barges and bring them alongside in such a position that the timber can be delivered from the ship into the barge. . . . . The custom found is . . . . that in the case of long lengths of timber the shipowner alone has to perform the operation of delivery into the barges, which, if there were no custom, would have to be performed by both parties together. . . . . The question is whether the custom . . . . is contrary to the terms of the charterparty. I think not. It simply explains what delivery of the cargo to the consignee alongside is and how it is to be effected—namely, by the act of the shipowner alone instead of the joint act of both parties."

In *Glasgow Navigation Co.* v. *Howard* (3) Hamilton J. had before him another dispute over the custom which was dealt with in *Aktieselkab Helios* v. *Ekman* (4) before Collins J. A question had arisen as to whether the customary duty of delivery of the timber into the barges by the ship included stowage in the barges, which question was not determined. Before Hamilton J. this question was tried out upon a great body of evidence, and decided in favour of the charterers. The arguments and the judgment show it to have been assumed by both parties that if the custom included stowage

(1) "The Times," May 11, 1877.
(2) [1892] P. 411.
(3) 15 Com. Cas. 88.
(4) [1897] 2 Q. B. 83.

1920

THE TURID.

The President.

in the barges the charterers were entitled to succeed, and the judgment proceeds upon that footing.

Our attention was further called to the Irish case of *Northmoor Steamship Co.* v. *Harland & Wolff* (1), in which the late Chief Baron Palles examined the authorities to which I have referred, other than *Glasgow Navigation Co.* v. *Howard* (2). That case was decided later. The observations of the learned Chief Baron are not directly in point here; but any opinion of so great a master of the common law commands attentive consideration, and I respectfully concur in the view taken by the Chief Baron with regard to the effect of the judgments in *Holman* v. *Wade* (3) and *The Nifa* (4), and the mode in which the decision in *Stephens* v. *Wintringham* (5) can be reconciled with them.

Mr. Mackinnon argued on behalf of the appellants that once a customary condition is introduced into the contract which gets rid of the obligation of the merchant to take delivery of the cargo at the ship-rail, the question of whether a particular place is alongside is to be determined by custom. I cannot entirely accept this proposition, and I do not think it follows naturally from the judgment of the Court of Appeal in *Aktieselkab Helios* v. *Ekman* (6), or necessarily from the judgment of Bigham J. in *Stephens* v. *Wintringham*. (5) The barge in *Aktieselkab Helios* v. *Ekman* (6) was literally "alongside." The quay in the case before Bigham J. was alongside, if it can be regarded as an entirety. Whether the place of delivery selected by the charterer, 60 feet from the ship, was a place of delivery alongside is another matter. If so, it was alongside because in part and in whole the quay was alongside. But to say that premises like those in the present case, which are separated from the ship's side by 13 feet of waterway and a breadth of quay space not available for receipt of goods, are alongside the ship by force of custom, seems to me to make custom contradictory of fact.

I think the custom relied upon is not reasonably consistent

(1) [1903] 2 I. R. 657.
(2) 15 Com. Cas. 88.
(3) "The Times," May 11, 1877.
(4) [1892] P. 411.
(5) 3 Com. Cas. 169.
(6) [1897] 2 Q. B. 83.

with the agreement of the parties, and the appeal should be dismissed.

HILL J. read the following judgment: The relevant terms of the charterparty are as follows: "To proceed to Great Yarmouth as ordered, or so near thereunto as she may safely get, and deliver the same always afloat"; and "the cargo to be . . . . taken from alongside the steamer at charterers' risk and expense as customary."

The ship was ordered to discharge at a portion of the quay occupied by the charterers. "Always afloat" she was able to get within a distance of about 13 feet from quay to rail. She there discharged. The method of discharge was that a staging was slung from the ship's side to the quay abreast of each of the three holds, and the stevedore's men, working in two gangs, carried the timber from the ship's deck and holds across the staging and on to the quay, and stacked it on the quay, leaving a space of 10 or 12 feet between the edge of the quay and the outer edge of the stacks; one gang broke out the timber and carried it to the ship's rail; the other received it on the staging and carried it to the place of stacking on the quay and there stacked it. The space of 10 or 12 feet was necessarily left, as cargo was not permitted to obstruct a passage-way along the quay edge. It was admitted that discharge into lighters was not practicable, and that the only practical method of discharge was that which was adopted.

The contention of the charterers was that, by the custom of the Port of Yarmouth, the whole of this work was done by and at the expense of the shipowner. The contention of the shipowners was that the custom was inconsistent with the express terms of the charterparty, and that their obligation was to deliver at the ship's side, i.e., that the work of the first gang was ship's work, but the work of the second gang, including the erection of the stagings, was charterers' work. The amount in dispute is the difference between the cost of the whole of the work and the rate for delivery at the ship's rail.

1920

THE TURID.

Hill J.

The custom proved, and not disputed, was as follows: "It is the custom to erect a wooden stage between the ship and the quay, and for stevedores to be employed by the ship-brokers to carry the cargo for the shipowners from the ship's rail over the wooden staging and to put it down 10 or 12 feet from the edge of the quay. This is all done at the cost and expense of the shipowners."

The question is whether that custom is so inconsistent with the express terms of the charterparty that it cannot be read into it. The custom is not inconsistent with the words "deliver the same always afloat," because the ship, being always afloat, could deliver in the customary manner. Is the custom inconsistent with the words "cargo to be taken from alongside the steamer at charterers' risk and expense as customary"? That means that the cargo is to be taken from alongside in the customary manner. It connotes a corresponding obligation on the ship to deliver the cargo to alongside in the customary manner. From the point when and where the cargo is delivered alongside in the customary manner, it is to be at charterers' risk and expense. Up to that point it is to be at the ship's risk and expense. The question is: Does the custom proved explain "alongside," or does it contradict "alongside"? Prima facie, "alongside" means along the side of the ship, and if the contract is for delivery alongside, and nothing else, and no custom, the operation of discharge is a joint one, the ship delivering and the merchant receiving the timber as it is passed over the ship's side. But by custom, delivery alongside may be at a point beyond the ship's rail, and custom may involve an obligation upon the ship to deposit the cargo at some place alongside, and put that work upon the shipowner alone, and such a custom is not inconsistent with "alongside." In *Aktieselkab Helios* v. *Ekman* (1) the custom put the obligation on the shipowner to deposit the timber in the lighters which lay alongside the ship. In like manner, if the custom be that the shipowner deposits the cargo on the quay at the side of the ship, there would, in my opinion, be no inconsistency with

(1) [1897] 2 Q. B. 83.

the obligation to deliver "alongside." And, in such a case, some extension must necessarily be given to "alongside"—it cannot mean a mathematical line immediately along the side of the ship; the cargo in being deposited on the quay must cover some space, and in practice would hardly ever be placed on the very edge of the quay.

Speaking for myself, I should be prepared to hold that the question whether a spot which is not immediately along the side of the ship is "alongside" or not, ought to be determined by the answer to the question whether it could reasonably be said to be "along" the side of the ship, and that a custom which was not unreasonable in that respect did not contradict the word "alongside." And I should, in the present case, be prepared to say that the place of deposit was reasonably along the side of the ship, notwithstanding that the ship was not close up to the quay nor the deposit on the very edge of the quay. I should, therefore, not be prepared to say that the custom was inconsistent with the express terms of the charterparty, and I should decide as I believe Bigham J. decided in *Stephens* v. *Wintringham*. (1) But now that the record in *Holman* v. *Wade* (2) has been examined, I am unable to distinguish it and feel bound to follow it. If the custom in *Holman* v. *Wade* (2), where the ship was against the quay, was inadmissible as inconsistent with the express terms, it is a fortiori inadmissible here. In *Holman* v. *Wade* the jury found the alleged custom proved. The alleged custom as pleaded was: "It is the customary and required mode of discharge of the Victoria Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof": and it was pleaded that "accordingly it was the duty of the plaintiffs to have delivered the said cargo on the quay alongside the *Volga*." The words of the charterparty were, in the material parts, identical with the words of the charterparty in the present case. The Court of Appeal

(1) 3 Com. Cas. 169.

(2) "The Times," May 11, 1877.

1920

THE TURID. Hill J.

upheld Manisty J. in rejecting the custom as inconsistent with the express words.

I follow the Court of Appeal in *Holman* v. *Wade* (1), and, in so doing, I also follow the decision of this Court in *The Nifa* (2), though I think the reasoning of the judges in *The Nifa* (2) is different and such as I do not express my agreement with. I find it very difficult to reconcile *Stephens* v. *Wintringham* (3) with *Holman* v. *Wade.* (1) In *Northmoor Steamship Co.* v. *Harland & Wolff* (4) the cargo was to be taken from alongside "always within reach of the ship's tackles," which is clearly distinguishable.

I agree that the appeal must be dismissed.

Solicitors for the appellants: *Trinder, Capron & Co.*
Solicitors for the respondents: *Botterell & Roche.*

(1) "The Times," May 11, 1877.
(2) [1892] P. 411.
(3) 3 Com. Cas. 169.
(4) [1903] 2 I. R. 657.

E. C. T.

[ADMIRALTY.]

1920

May 18, 19.

(In Prize.)

THE VESTA and Other Ships.

[1918. No. 1762.]

Prize Court—Enemy controlled Company—Transfer of Share Capital to Neutrals—Enemy Cargo—Transfers in Transitu—Transhipment from Enemy to Neutral Vessels—Passing of Property.

A German steamship bound to Rotterdam with a cargo of magnesite (non-contraband) took refuge on the outbreak of the war in August, 1914, in the then neutral port of Lisbon. The cargo was owned by a company formed under the laws of Holland and carrying on business at Rotterdam, but 98 of the 100 shares into which the capital of the company was divided were held by one of the directors, a German. After the outbreak of war between Portugal and Germany on March 9, 1916, the German vessel was requisitioned, and in September, 1916, the cargo was landed on to a quay at Lisbon. Meanwhile in March, 1916, the German owner of the 98 shares had transferred them to a Dutchman, and the company had entered into an agreement to sell the magnesite to the claimants, a Dutch company carrying on business at Kampen in Holland. In November and December, 1916, in pursuance of the contract of sale, the cargo was reloaded into three Dutch vessels for carriage to Amsterdam. According to the bills of lading the Dutch Consul at Lisbon appeared as the shipper and the Netherlands Oversea Trust as the consignees. Under the terms of the contract the claimants had the right to refuse to accept the goods if found to be unsuitable for their business. In the course of their voyage the three vessels called at British ports where the parcels of magnesite were seized as prize :—

Held, (*a*) that a Prize Court would not investigate the question of the transfer of shares whereby it was alleged that the sellers had changed their character and divested themselves of their enemy disabilities ;

(*b*) That the contention of the Crown that, as long as the original voyage was incomplete, there was an indefeasible right of capture, was too wide ; and that if the enemy sellers had entirely divested themselves of the whole of their interest in the goods, and that divestment was accompanied by delivery to the neutral transferee, the transfer would be valid and would defeat the right of capture.

Held further, however, that as under the contract the claimants had the right to reject the goods, the enemy sellers still retained an interest in them, and therefore that there was not that effective transfer which would defeat the right of capture, and that the goods must be condemned as good and lawful prize.

Action for the condemnation of cargo as enemy property.

In July, 1914, 1000 tons of magnesite were shipped on the

1920

THE VESTA.

German steamship *Naxos* at various Greek ports for carriage to Rotterdam. The shippers were the Internationale Magnesiet Werken, a limited company formed under the laws of Holland and carrying on business at Rotterdam and in Greece. The capital of the company was 100,000 fl. divided into 100 shares of 1000 fl. each. Of these, 98 shares were held by one of the directors, Julius Gutermann, a German, and one share by R. K. Gutermann, his son. The remaining share was held by a Dutchman, the brother-in-law of Julius Gutermann. On March 21, 1916, Julius Gutermann purported to sell his shares to one Wols van den Wel, a Dutchman of Amsterdam.

On the outbreak of the war the *Naxos*, which had started on her voyage to Rotterdam, took refuge in the then neutral harbour of Lisbon, where she remained until after war had broken out between Germany and Portugal. She was then requisitioned by the Portuguese Government, and in September, 1916, the cargo was discharged on to a quay. Meanwhile the Internationale Magnesiet Werken (hereinafter referred to as the sellers) had entered into negotiations with the claimants, the N. V. Chemische Fabriek Kampen of Kampen, Holland, for the sale to them of the cargo of magnesite, and on February 4, 1916, a contract of sale was entered into. The first instalment of the purchase price was to be paid as soon as the sellers produced evidence that the goods would be released by the Portuguese Customs. The second instalment was to be paid as soon as the goods had arrived. The contract also provided that if the goods, when being manufactured, were found unsuitable for the claimants' business, the claimants should have the right to refuse to accept the goods.

In November and December, 1916, in accordance with the contract, the magnesite was reloaded into three Dutch vessels, the *Vesta*, *Castor* and *Titan*, for carriage to Holland. The shipper, according to the bills of lading, was the Dutch Consul at Lisbon, and the consignees were the Netherlands Oversea Trust Co. In the course of their voyage to Amsterdam the vessels called at British ports and the three parcels of

magnesite were seized as prize. The parcel ex the *Vesta* was seized on November 8, 1916, ex the *Castor* on December 4, and ex the *Titan* on January 22, 1917. The first payment by the claimants to the sellers was made on November 2, 1916; a further payment in respect of the second instalment was made on January 1, 1917; and a final sum in full settlement on March 2, 1917.

Clement Davies for the Procurator-General. Although incorporated under the laws of Holland the Internationale Magnesiet Werken must be deemed an enemy company: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1); *The Hamborn.* (2) Although the company purported to change its character in March, 1916, a Prize Court will not investigate the question of the transfer of shares; and even if there was a bona fide change in the character of the company, that cannot change the character of goods which were enemy goods when shipped. The alleged transfer to the claimants would defeat the indefeasible right of a belligerent to capture enemy goods so long as the original voyage is incomplete: see *The Bawean* (3); and the transfer, therefore, is invalid whether the contract of sale was bona fide or not: *The Jan Frederick.* (4) It is also immaterial that the goods were transhipped into neutral vessels; the transhipment having been from an enemy vessel the goods are not entitled to the protection afforded by the Declaration of Paris to enemy goods under a neutral flag: *The Jeanne* (5); *The Bawean.* (3)

Inskip K.C. and *Balloch* for the claimants. The transfer of the enemy owned shares to a neutral changed the character of the goods owned by the company. At the date of seizure, which is the material date, the shareholders of the Internationale Magnesiet Werken were neutral, and if the property in the magnesite was still in them it was neutral property. The property, however, had already passed to the claimants, who had taken delivery by their agent, the Dutch Consul.

(1) [1916] 2 A. C. 307.
(2) [1919] A. C. 993.
(3) [1918] P. 58.
(4) (1804) 5 C. Rob. 127.
(5) [1917] P. 8.

1920

THE VESTA.

The property passed when the transhipment was permitted by the Portuguese authorities and the claimants paid the first instalment of the purchase price. The mere fact that a portion of the price remained unpaid is immaterial: see *The Ariel.* (1) But even assuming that at the date of seizure the goods are to be regarded as enemy goods, they are protected by the Declaration of Paris. Neither *The Jeanne* (2) nor *The Bawean* (3) are authority for the proposition that enemy goods transhipped into neutral vessels are not entitled to the protection of the neutral flag. Sir Samuel Evans' observations on that point in *The Bawean* (3) were obiter, as the goods in that case had been landed and were therefore no longer under the neutral flag; and in *The Jeanne* (2) the goods seized ex the neutral vessel were foodstuffs and therefore conditional contraband. The Declaration of Paris protects the enemy goods themselves and not merely the neutral shipowners: *The Dirigo.* (4)

The dicta in *The Bawean* (3) that enemy goods retain their enemy character until they reach their destination, and that no transfer in transitu could be effectual so as to defeat the right of capture unless the transferee has obtained possession, are too wide if they mean that the transferee cannot take possession at a point short of the original destination, and are in conflict with the decision of the Privy Council in *The Baltica.* (5)

Clement Davies in reply. Goods which have been loaded on an enemy vessel prima facie are enemy property: *The Roland.* (6) The onus, therefore, is on the claimants to prove that the goods had ceased to be enemy property. To defeat the right of capture the claimants must have obtained both possession and property, and as they had the right to reject the goods after arrival in Holland the property in the goods would not pass until the respective parcels were accepted. The goods, therefore, are still enemy property. The only people who can claim the protection of the Declaration of

(1) (1857) 11 Moo. P. C. 119.
(2) [1917] P. 8.
(3) [1918] P. 58.
(4) [1919] P. 204.
(5) (1857) 11 Moo. P. C. 141.
(6) (1915) 1 Br. & Col. P. C. 188.

Paris, assuming it applies, are the owners of the goods—i.e., the enemy sellers who are not before the Court.

The PRESIDENT (SIR HENRY DUKE). This is the claim of a Dutch company, the N. V. Chemische Fabriek Kampen, to have paid to them out of Court the proceeds of sale of certain parcels of magnesite which were seized as prize out of the steamships *Vesta*, *Castor* and *Titan* in course of their voyage from Lisbon to Amsterdam. The goods formed part of the cargo of the German steamship *Naxos*, a vessel belonging to the German Levant Line. The *Naxos*, at the outbreak of war, had been on a voyage from the Eastern Mediterranean to Rotterdam with a cargo of magnesite, and had taken refuge in the port of Lisbon shortly after the outbreak of war, where she remained until the transhipment of various parcels of the cargo to the *Vesta*, the *Castor* and the *Titan*.

The arguments before me proceeded upon an admitted case as to the goods in question at the time the *Naxos* took refuge at Lisbon. The goods, by reason of the position of the company who had chartered the *Naxos* to carry them to Amsterdam, were enemy goods. The company who were the owners, the Internationale Magnesiet Werken, were a corporation with 100 shares, of which 98 were held by a German national, and the two others by his near relations, one of whom was engaged in the management of the concern. In that state of the facts it is indisputable—by reasons of decisions arrived at during the war in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1), and in other cases—that the goods on board the *Naxos* were enemy goods, and if they had been captured on the voyage from the Levant to Lisbon, or elsewhere between the port of embarkation and the port of discharge, would have been condemnable as prize.

The questions arise with regard to the transactions which took place after the *Naxos* had been a long time laid up at Lisbon. They were transactions made in good faith—there is no dispute about that. The claimants are chemical manufacturers in Holland carrying on an old-established business,

(1) [1916] 2 A. C. 307.

1920

THE VESTA.

The President.

and they were sorely in need of magnesite for the purposes of their trade, and when they negotiated with the Internationale Magnesiet Werken they negotiated for the purpose of securing supplies of magnesite to be used by them in their chemical works at Kampen. The question is whether, having in good faith entered into a contract which is described as " a contract concerning sale and purchase," they acquired such a title to these goods that at the time of capture the goods were theirs and not—in contemplation of the law of prize—the goods of an enemy owner. The contract which is relied upon was made on February 4, 1916. The sailings of the three vessels in question took place at dates considerably later. The first seizure was in November, the second in December of 1916, and the third in January of 1917. The bills of lading for the several parcels were dated November 2, November 27, and December 26, 1916.

Various events, which were the subject of discussion in the course of the argument, occurred between February 4, 1916, and the sailings of the three vessels in question and the capture of the several parcels of goods. Two were particularly considered. First, the entry of Portugal into the war, as an ally of the great Powers who were originally engaged in the war against Germany, an event which dates from March 9, 1916—(that occurred at a time when the *Naxos* with her cargo was still lying at Lisbon). I attach no weight in this case to that occurrence. The second event was that of a change in the ownership of the shares in the Internationale Magnesiet Werken. All I know about that is derived from what is stated in the affidavit filed on behalf of the Crown to the effect that what purported to be an assignment of the 98 shares which were in German ownership at the outbreak of war had been made on March 21, 1916, to a citizen of the Netherlands. I come to the conclusion, for reasons which I will state later, that the second of those facts—the transformation in the shareholding of the Internationale Magnesiet Werken has no material effect in this case.

The main questions raised were first, whether an effective transfer of the property in the goods in question could be

made at the time, and in the circumstances, when the transfer is alleged to have been made; and, secondly, whether the transfer alleged to have been made, was a good transfer to defeat the right of capture by a belligerent.

It is material that the voyage which was interrupted by the entry of the *Naxos* into Lisbon was a voyage to Rotterdam and that the bills of lading—there were two bills of lading, one for a parcel of 600 tons shipped for a voyage from Lefkanti to Amsterdam, and the other for a parcel of 400 tons shipped for a voyage from Limni to Amsterdam—show as the shippers the Internationale Magnesiet Werken, and as the consignees the same firm to their order: "to be delivered at Rotterdam unto order," is the expression in the bills of lading.

The three bills of lading for the voyages from Lisbon to Amsterdam were, as regards the *Vesta* for 110 tons, the *Castor* for 530 tons, and the *Titan* for 110 tons, and the shipper named in the bills of lading was the Dutch Consulate at Lisbon. The consignees were the Netherlands Oversea Trust, and there was a marginal note upon each of the bills of lading in these terms: "bill of lading to order: steamship agents to advise Chemische Fabriek Kampen, Holland." Thus the bill of lading does not disclose the identity of the shipper and is made out to the order of a consignee who, on the face of it, does not purport to be the true consignee of the goods.

As to the first question, whether a transfer of these goods could have been made at the time when, and in the place where, the transfer is alleged to have been made, Mr. Davies, for the Crown, relied upon the judgment of my predecessor, Sir Samuel Evans, in *The Bawean* (1), and he contended for a principle which he founded upon the decision in *The Bawean* (1) that no transfer of these goods until the voyage on which they had been embarked at the Levantine ports was a completed voyage, could be an effectual transfer so as to defeat the right of capture. I think that is a novel proposition. There is colour for it in various judgments in prize, but I have come to the conclusion that it is a proposition which is too wide to be an accurate statement of the law of prize with regard to

(1) [1918] P. 58.

1920

THE VESTA.

The President.

the right of an enemy owner of goods to transfer the property in them after shipment and before arrival at the original port of destination. The subject is one which has been discussed from time to time. The principal modern authority is *The Baltica* (1)—a judgment of the Privy Council delivered by Mr. Pemberton Leigh in 1857—where a principle less sweeping than that contended for on behalf of the Crown was stated to be the true expression of the rule. Mr. Pemberton Leigh said this: "A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such a case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain in transitu."

The contention of the Crown was that as long as the original voyage is incomplete, there is an indefeasible right to capture. It is hardly necessary to point out how very comprehensive is that alleged right of capture. It seems to attach—at any rate for the duration of any war—a right of capture in respect of any enemy goods which have once been put on shipboard, and have not reached the port for which they were destined. If that contention truly represents the law it would be effectually made in this case, but as I have said, I think that statement of the law is too wide. If the judgments of Lord Stowell are considered—judgments which contain the original statement in our own Courts of the principles which were stated anew in the Privy Council in *The Baltica* (2)—it will be seen that Lord Stowell clearly recognized the possibility of a premature termination of the voyage upon which the vessel had

(1) 11 Moo. P. C. 141, 145. (2) 11 Moo. P. C. 141.

originally entered. In *The Danckebaar Africaan* (1) in 1798, Lord Stowell first stated in a reasoned judgment the principle that enemy goods may not change their character in transitu during a war, and he cited in his judgment a case decided sixteen years earlier by the Privy Council in which Lord Camden had stated the principle in these terms : " The ship sailed as an enemy ship," that is as a Dutch ship in the case which was under consideration—" and could not change her character in transitu." That is the broad proposition, and is that which was reaffirmed in *The Baltica*. (2) *The Danckebaar Africaan* (1) was a case of a vessel in Dutch ownership which had sailed from one of the Dutch Asiatic colonies for Holland, and had been due to call at the Cape as a port of call on her way to a Dutch European port. Between the time of her sailing and the time of her arrival in South African waters the Cape had been captured by the forces of the British Crown. There had been a surrender after armed operations, and the white population of the Cape had been taken into the protection of the Crown, and the property in their goods had been secured to them, so that they were as capable of holding goods as any citizens of the United Kingdom were from that time forward. The vessel was captured a few miles off the African coast, and a question arose as to whether at the time of the capture she was enemy property or neutral property, her owners being present, or being represented, at Cape Town. Lord Stowell held that she was enemy property—that she had been dispatched upon a voyage as an enemy ship, and that she could not change her character in transitu, but he also said this : " If the vessel had arrived at the Cape, I will not say, that coming actually into the hands of the capitulants, she might not have been protected as property in possession." Now that seems to be a clear recognition of the principle that, although the original voyage has not been completed, the presence of the vessel, or of the goods on board the vessel, in a port of safety such as a neutral port, puts the owner of the ship or goods in a position to decide for himself as to the destination of his ship or his goods—puts him in a position to abandon the

(1) (1798) 1 C. Rob. 107, 113. (2) 11 Moo. P. C. 141.

1920

THE VESTA.

The President.

original enterprise. Lord Stowell considered the same question in *The Carl Walter*. (1) That was a case where the goods, which were Spanish property—Spain being a Power at war with this country then—were consigned to a Portuguese port, and sailed under Portuguese convoy for the Tagus. It was not a Portuguese venture, Portugal having been, as at all times during the last 200 or 300 years, the friend—and at that moment she was the ally—of this country in the war which was going on. But these goods—apparently from stress of circumstances against which the Portuguese Power was unable to bear up—were brought across the Atlantic under Portuguese convoy and discharged in the Tagus, not at a port of discharge for Portuguese colonial goods, but at a place where Spanish goods might be discharged. They were subsequently re-dispatched on board a coasting vessel to a port in Spain, so that the transit was from a Spanish owner in South America ultimately to a Spanish consignee in Europe, and the question arose as to what was the effect, first of all, of the delivery in the Tagus of these goods. It was held that, although there had been delivery into waters of a friendly Power under convoy of the fleets of that friendly Power, an enemy character attached to the goods, and they were subject to confiscation. But Lord Stowell in the course of his judgment considered the question whether a change of the property in these goods could have taken place at the Portuguese entrepot. He said: "It is not possible that Mr. Belgeiar"—he was the claimant—"could have been the proprietor in Buenos Ayres—as such, he would not have been permitted to import. He must have become the purchaser then at Porto Franco; and if so, there should have been some document of his title on board." Lord Stowell, therefore, conceived the possibility of an effective transfer of these goods in a friendly harbour at Porto Franco, and would have been ready to entertain the legality of such a transaction. In the case of another parcel of goods, which had been dispatched under the same convoy, there was a claim by a merchant at Embden who prayed for leave to admit further evidence, and Lord Stowell, in considering the question

(1) (1802) 4 C. Rob. 207, 212, 214.

whether evidence of that claim might be received, said this: "If they were going actually to Embden, there had been a termination of the original voyage." That seems to me to indicate the view of Lord Stowell that, although the destination had been originally an enemy destination, nevertheless if there had been an abandonment of the enemy enterprise at that time, and a true interposition of neutral ownership, the result would have been to defeat the claim in prize.

It seems to me, on the whole, that the claimants are right in their contention that at Lisbon at the time when they entered into the contract into which they did enter, it was possible that they should acquire a good title to this property which would have defeated the right of capture.

The next question is whether the transaction in question did in fact defeat the right of capture? That raises the question of what is required for that purpose. To my mind the law as to an effective transfer is sufficiently stated in the passage from the judgment of Sir Samuel Evans in *The Bawean*. (1) It had been stated in *The Baltica* (2), and Sir Samuel Evans in *The Bawean* (1), I am satisfied, did not intend to depart from the rule laid down in the Privy Council. The learned President said this: "It is quite clear law according to the Prize Courts in this country, and in America too (and I think in Germany also), that goods which belong to an enemy when they are once shipped, and therefore become subject to the risk of capture at the hands of belligerents, will retain their enemy character until they reach their destination, and no transfer to a neutral will be effective so as to defeat the right of capture unless the transferee has actually taken possession of the goods."

I have dealt with the question as to the destination, on which perhaps I take a somewhat narrower view than that which was taken by Sir Samuel Evans, but as to the requirements for an effective transfer—the part of the matter for which I am referring to *The Bawean* (3)—what is stated is that

(1) [1918] P. 58, 64. (2) 11 Moo. P. C. 141.
(3) [1918] P. 58.

1920

THE VESTA.

The President.

there must be a transfer, and the transferee must have actually taken possession of the goods. I regard that part of the judgment as entirely in accordance with the judgment in *The Baltica* (1), but it is not as full a statement as could be made of the requisites of the transfer which will defeat the right of capture in prize. In *The Sechs Geschwistern* (2) Lord Stowell stated it in these terms : "The rule which this country has been content to apply is, that property so transferred "—that is, transferred by the enemy to a neutral—"must be bona fide and absolutely transferred ; that there must be a sale divesting the enemy of all further interest in it ; and that anything tending to continue his interest, vitiates a contract of this description altogether." That statement of the law was considered in *The Ariel* (3) in the Privy Council in 1857, and the Privy Council adopted the exact language of the statement of the rule by Lord Stowell.

What is required then—as I gather the law from the authorities from whence it is to be derived—is that once and for all the enemy owner must put off his whole ownership and interest in the goods, and that the act of transferring the whole of his right and interest in the property must be accompanied by a present delivery. It is not until there is a complete transfer to that intent, and a delivery following upon that transfer, that the right of capture is defeated. Those are the principles upon which I find myself bound to proceed in examining the transaction in this case.

The claimants do not state in their claim the origin of their interest in the goods which they assert to be theirs. They set up their alleged right, but there is no root of title for the claim except that which is found in the agreement of February 4, 1916. It was suggested that there were acts of the German owned company during the year 1916 which in some way gave additional effect to this transaction of February, 1916. It was contended that the company, although an enemy company at the date of the contract, had become a neutral company at the date of the transfer of the goods. I

(1) 11 Moo. P. C. 141. (2) (1801) 4 C. Rob. 100.
(3) 11 Moo. P. C. 119.

1920

THE VESTA.

The President.

had great difficulty in appreciating the full effect of that proposition. The transaction which was relied upon seems to be one of those transactions of an elusive character which have always been held in Courts of Prize to be insufficient to defeat the rights of capture. It has been said that the reason why paper transactions effected during the voyage of a ship cannot be examined as against the right of capture is that it is almost impossible to ascertain the truth in such a case—that the fabrication of a case is simple and the effective examination of it is almost impossible. If that is a test which has to be applied to commercial transactions of an everyday kind, I have asked myself how is it possible that a transaction such as is here relied upon—a change in the ownership of shares in an incorporated company with its effect upon the disposition of the management of the company—can be set up as an answer to the right of capture, or can be regarded in a Court of Prize as an answer to the right of capture ? It is a process which might entitle persons claiming property under transfers by enemy corporations to require captors to enter into investigations many times in the course of a single voyage. It is a process which lends itself to fraud. I do not think there was any fraud in this case, but I decline to examine the question. I decline to consider whether, in the course of the transit of these ships, the German vendors of the goods had changed their character, or had divested themselves of their enemy disabilities. I think the case must be dealt with upon the footing that the root of title of the claimants is the agreement of February 4, and, if there is not a good title founded in the transactions which are witnessed by that agreement, there is no good title at all.

It is an agreement by which the parties declare that they have agreed regarding the sale and purchase of 1000 tons of raw magnesite. They declare it to be " purchased lying in the s.s. *Naxos*." They declare that " all the expenses arising through the release, delivery, transloading and transport of the goods, as well as the expenses which will be charged by the Netherland Oversea Trust, shall be borne by the buyer." They fix a price—half to be " payable as soon as the seller shall

1920

THE VESTA.

The President.

produce evidence that the goods will be released by the Portuguese Customs, and no objections are raised by or in the name of the Deutsche Levante Linie against the transloading and it is therefore certain that such transloading can take place. The second instalment shall be payable as soon as the goods have arrived, and in case of the superficial approval by the buyer, or in case the ship or cargo is lost or is declared forfeited by one of the belligerent parties, immediately this has become known, but not later than two months after the payment of the first instalment, irrespective of whether all the goods have been shipped or not. The transloading, shipment, etc., shall take place in the seller's name, for the account and risk of the buyer."

There are in addition two clauses which seem to me to be very material to the matters here in question. The first is, "If the goods when being manufactured are found to be unsuitable for buyer's industry, the buyer shall have the right to refuse to accept the parcel, and the seller shall be bound to take back the magnesite and to repay the amount of the purchase price already paid increased with the sea-freight from Lisbon, to a maximum of thirty shillings per ton." The second is, "The buyer shall have the right to dissolve this contract if it appears that owing to any prohibition or other unforeseen circumstances the transloading and/or shipment is rendered impossible." Those two clauses seem to me to raise a very serious question. As to the alleged title of the claimants to repudiate the contract, that was a right to be exercised before the transhipment at Lisbon. I am not sure that it has any conclusive effect here. It introduces considerations on the question whether there was an absolute disposition of the goods, which must be taken into account with other general considerations arising upon the agreement. But with regard to the clause which enables the buyer to refuse acceptance of the parcel at Rotterdam it seems to me that that is a much more serious matter. I put the question to myself in this way: Assume these goods to have been transhipped at Lisbon upon a neutral vessel, and to have been found at sea under such a bill of lading as is here in question—that is, a bill

of lading with a nominal consignor and a nominal consignee, and with an agreement for sale which contained a provision that upon arrival at the port where the vendor and the purchaser both had their establishments, it should be at the option of the purchaser, upon an unascertained state of facts, to disclaim any property in the goods—could it be said that there was such an absolute disposition of the goods by the enemy vendor as satisfied the test laid down by Lord Stowell in *The Sechs Geschwistern* (1) and reiterated by the Privy Council in *The Ariel* ? (2) I put aside the other objections of uncertainty in this transaction, but it seems to me there was, by the operation of the clause to which I have last referred, an interest reserved in the enemy vendor.

There being an interest reserved in the enemy vendor, the result is that I am bound to hold that this was not an effective transfer of these goods in the course of the voyage upon which they had entered which defeated the right of capture ; that the right of capture was existent and was duly exercised ; and that the goods must be condemned as good and lawful prize.

Solicitor for the Procurator-General : *The Treasury Solicitor.*
Solicitor for the claimant : *Albert M. Oppenheimer.*

(1) 4 C. Rob. 100. (2) 11 Moo. P. C. 119.

E. C. T.

1920
June 1.

[ADMIRALTY.]

THE CHELSTON.

(1920, fol. 42.]

Admiralty—Courts of Formal Investigation into Shipping Casualties—Notices of Investigation—Formulation of Charges—Cancellation and Suspension of Certificates—Shipping Casualties and Appeals and Rehearing Rules, 1907—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 470—*Canada Shipping Act,* 1908 (7 & 8 *Edw.* 7, *c.* 65), *s.* 36.

The Shipping Casualties and Appeals and Rehearing Rules, 1907, made under the Merchant Shipping Act, 1894, govern the procedure in British Wreck Commissioners' Courts, and the rights of British shipmasters in such Courts must be ascertained by considering whether the local provisions diminish the safeguards given to British masters by the British Rules.

Under rule 3: "When an investigation has been ordered, the Board of Trade may cause a notice, to be called a notice of investigation, to be served upon the owner, master, and officers of the ship. . . . . The notice shall contain a statement of the questions which, on the information then in possession of the Board of Trade, they intend to raise on the hearing of the investigation. . . . ." Under rule 12: "After the questions for the opinion of the Court have been stated, the Court shall proceed to hear the parties to the investigation upon, and determine the questions so stated. . . . ."

By s. 470, sub-s. 4, of the Merchant Shipping Act, 1894: "A certificate shall not be cancelled or suspended by a Court [holding a formal investigation into a shipping casualty] unless a copy of the report or a statement of the case on which the investigation or inquiry has been ordered, has been furnished before the commencement of the investigation or inquiry to the holder of the certificate."

Under s. 36 of the Canada Shipping Act, 1908, "A certificate shall not be cancelled or suspended . . . . unless the holder of the certificate has had an opportunity of making a defence":—

Held, that the section amply protected the rights of British shipmasters and was not repugnant to the provisions of the Merchant Shipping Act and the Rules made thereunder.

A British master holding a Board of Trade certificate received a notice of investigation calling upon him to appear before a Wreck Commissioner's Court at Montreal appointed "to inquire into the causes which led to the casualty [the stranding of his vessel] and into all the facts connected therewith." The notice contained no other statement of the questions intended to be raised, and no charges were specifically formulated against the master before or at the inquiry that he was in fault in connection with any of the matters on which he was examined.

1920

THE CHELSTON.

The Court found the master guilty of an error of judgment in taking wrong helm action and in failing to stop and take soundings, and suspended his certificate for three months. The master appealed.

Held, that the master, having had no notice of the charges on which he had been found in fault, had not had an opportunity of making his defence, and that the decision of the Wreck Commissioner's Court must be quashed and the certificate restored free from suspension.

APPEAL from a finding of a Court of Formal Investigation held at Montreal into the stranding and loss of the steamship *Chelston*.

The appellant was the master of the British steamship *Chelston* which stranded off St. Paul's Island, Nova Scotia, on September 12, 1919, and became a total loss. On October 3 the master was advised that an investigation would be held, and a notice was subsequently served on him in the following terms :—

"CANADA, WRECK COMMISSIONER'S COURT.

"IN THE MATTER OF THE S.S. *Chelston* STRANDING.

"The following is a statement of the case upon which a formal investigation is ordered :—

"Information having been laid before the Minister of Marine and Fisheries of Canada, concerning the stranding of the s.s. *Chelston* on or near St. Paul's Island, on or about September 12th, 1919, the said Minister has directed me, the undersigned, L. A. Demers, F.R.A.S., of the City of Ottawa, Wreck Commissioner, to hold a formal investigation to inquire into the causes which led to the casualty, and into all the facts connected therewith, under the provisions of the Canada Shipping Act, c. 113, Revised Statutes of Canada, 1906.

"I, therefore, command you to be and appear before me at Wreck Commissioner's Court, Montreal, on Thursday, the ninth day of October, 1919, at ten o'clock in the forenoon, there to answer such questions, under oath, as shall be demanded of you, touching the aforesaid inquiry.

"I also command you then and there to bring with you and produce your certificate or license, the ship's register, the official and mate's log books, the engineer's log book, and all deviation cards and records of observations, charts, sailing

1920

THE CHELSTON.

directions and other documents that may have any bearing upon the case.

"You are notified that this Court has power to declare the certificate or license of such master, mate, engineer or pilot as may be at fault, to be suspended or cancelled, and to impose such fines and costs as are provided for in the statute hereinabove referred to.

"Given under my hand, etc."

No charges were formulated against the master, who appeared by counsel and was examined at considerable length. The Court then adjourned for the consideration of their finding, and on October 11 found that the master "erred gravely in judgment" when he hard-a-starboarded his helm on sighting a rock about a point on the starboard bow, and also in failing to stop and take soundings.

The master appealed.

Langton for the appellant. The master, as the holder of a British Board of Trade certificate, was entitled under the Merchant Shipping Act and the Shipping Casualties and Appeals and Rehearing Rules, 1907 (see in particular rr. 3 and 11 set out in the headnote), to have the investigation conducted in accordance with those provisions; and because the formalities there laid down were not complied with the master did not have a fair trial. He was entitled to a notice setting out the matters intended to be raised against him before the investigation began, in order that he might have an opportunity of preparing his defence.

Sect. 36 of the Canada Shipping Act, 1908, which repeals s. 801 of the Canada Shipping Act, 1906, merely provides that a certificate shall not be cancelled or suspended "unless the holder of the certificate has had an opportunity of making a defence," whereas s. 801 provided in addition the safeguards laid down in the British Merchant Shipping Act—namely, that "the certificate shall not be cancelled or suspended unless a copy of the report, or a statement of the case upon which the formal investigation has been ordered, has been furnished to

1920

THE CHELSTON.

the holder of the certificate and he has had an opportunity of making a defence." Further, s. 38 takes away all right of appeal except "to the Minister for a rehearing."

[*Branson.* I am not going to dispute that a master holding a British Board of Trade certificate has a right of appeal to this Court.]

The findings being merely that the master committed an error of judgment, and not that he was in default, the certificate should not have been suspended. Further, the finding that the ship had run her distance was contrary to the facts proved at the hearing.

Branson for the Board of Trade. The finding that it was the duty of the master to stop and take soundings, and that he omitted to do so, amounts to a finding of default. As regards the contention that the master did not receive adequate notice of the matters in respect of which the certificate was suspended, the notice stated that the causes which led to the casualty would be investigated, and that the Court could cancel or suspend the certificates of those persons found to be at fault.

Part VI. of the Merchant Shipping Act, 1894 ("Special Shipping Inquiries and Courts"), appertains only to the United Kingdom, and s. 470 and the Shipping Casualties and Appeals and Rehearing Rules are not applicable in Canada. There is no statutory requirement that notice of the questions intended to be raised shall be given, and s. 36 of the Canada Shipping Act, 1908, sufficiently protects the interests of the holder of a certificate. It is only fair to the master to state, however, that no definite questions seem to have been put to him as to why he took or did not take the measures in respect of which his certificate was suspended.

THE PRESIDENT (SIR HENRY DUKE). This is an appeal by a master mariner holding a master's certificate issued by the Board of Trade against a finding of the Wreck Commissioner's Court at Montreal whereby the appellant's certificate was suspended for three months.

The appeal, in the form in which it has been presented, raises questions of principle which might have far-reaching

1920

THE CHELSTON.

The President.

consequences. In particular there is a challenge of the power of the Legislature of the Dominion of Canada to make amendments in the practice and procedure as regards investigations into shipping casualties laid down in the Merchant Shipping Act, 1894, so far as those amendments affect the certificates of British shipmasters. A question of considerable gravity is also raised as to whether the rules which govern procedure in Canada under the Canada Shipping Acts provide sufficiently for the protection of a person implicated by charges before a Wreck Commissioner's Court.

The master of the *Chelston* was coming down the St. Lawrence with a cargo of timber. He was confronted with difficult weather, and he was navigating under conditions with which he was not familiar, and under sailing orders which no doubt put a considerable burden upon him. The current was changeable, and the set of the current at the point where the disaster occurred was liable to be affected by the direction of the wind, and it seems that on this occasion it was so affected. The true cause of the loss of the *Chelston* appears to have been that the master or navigating officer did not make sufficient allowance for the set of the current in the weather that prevailed. At the time when the vessel was supposed to be several miles to the southward of the island upon which she struck, in fact she was heading directly for it. The loss of the vessel took place on September 12, 1919, by reason of her stranding on St. Paul's Island, Nova Scotia.

There were communications between the ship's agents and the Board of Trade authorities in Canada with reference to the loss of the ship. The master was desirous of taking his passage from Montreal at a particular time, and the sitting of the Wreck Commissioner's Court was fixed with reference to that time. It was fixed for October 9, 1919. Owing to the exigencies of the master's position the inquiry was held late in the evening, and it was continued until nearly midnight, because the master wished to avail himself of the passage he had booked in a ship sailing the following day. The master and chief officer were examined for something like three and a half hours. The master had counsel with him, who asked some

1920

THE CHELSTON.

The President.

questions, and after the examination there was an adjournment for the purpose of the Wreck Commissioner stating at the adjourned date what were the findings of the Court. Subsequently findings were promulgated which found the master guilty of an error of judgment, and also that when the master had found that the ship had run her distance his duty was to stop and sound, which he failed to do. Upon these two findings an order was made suspending the master's certificate for three months.

It is not necessary to say anything with regard to the terms of the findings. If the findings had been those of a British Wreck Commissioner, it might have been desirable to express an opinion as to the precise terms of the decision, and as to the consequences which might follow from those terms. But in the view which we take of the case, it is not necessary to make any such expression of opinion.

The master first of all appeals on the substantial ground that he did not have due notice of the charges upon which, by the findings, his certificate was dealt with. Secondly, he appeals on the ground that the Canadian procedure did not satisfy the requirements of British law with regard to his certificate, and therefore was ineffective to warrant a finding which prejudiced the certificate. Thirdly, he complains that part of the finding—as to what was shown by the ship's log—was not in accordance with the evidence. I say nothing as to the last matter, though it is a tempting subject; but it is not necessary to consider it.

I come back to the two substantial questions which have to be considered. Having regard to the view we take upon the first question, the second, as to the conformity of the Canadian Statute and the Canadian Rules with the requirements of the British legislation in relation to British masters' certificates, becomes really immaterial. But it has been raised, and it is desirable, perhaps, to express an opinion upon it, although it is not a ground upon which our decision is based. In my view, the Rules made by the Lord Chancellor govern the procedure in British Commissioners' Courts. The rights of a master in a Canadian Wreck Commissioner's Court are to

1920

THE CHELSTON.

The President.

be ascertained by considering whether the provisions of the Canadian enactments diminish in any way the safeguards for the master's interests given him by the British legislation. In my opinion they do not. The Canadian legislation amply protects the rights of shipmasters, and I hope the judgment we propose to give will make it clear that that is so. This case will merely be an instance of the efficacy of the provisions of the Canadian Statute for the protection of a shipmaster who comes within the Canadian jurisdiction. Besides being a matter of general interest, it is important for it to be recognized in this country as well as in Canada that justice is administered in the Dominion of Canada, as it is here in the United Kingdom, with proper regard to the elementary principles which have governed the administration of justice among civilized peoples at all times. The Canada Shipping Act, 1908, by provisions in s. 36, substitutes certain words for the provisions in the British Statute of 1894, which are ample for the protection of shipmasters. The provision introduced by amendment is in these terms: "The certificate shall not be cancelled or suspended unless the owner of the certificate has had an opportunity of making a defence."

I say nothing about foreign systems of law, but I think it is true of our own system and of the law which prevails throughout the British Empire, that, as an elementary principle of justice inherent in our law, there must be a hearing and there must be a charge preferred before a penalty can be inflicted. The provisions of the Merchant Shipping Act to which reference has been made in this case—the particular provisions which direct that this or that step shall be taken—are merely modes of securing for the persons affected the benefit of that principle of our jurisprudence. The provisions of the rules framed by the Lord Chancellor are provisions with the same object. But it seems to me that the interests of shipmasters are more effectively protected rather than less by being embodied in that provision in s. 36 of the Canadian Act of 1908, instead of being limited by specific directions in rules. It makes it easier to administer justice if one has specific directions in rules which show how the

interest of the suitor is protected, but if the matter be at large, and one merely has to do justice, then it is sufficient to say that the interest of the suitor, in this case the appellant, shall not be prejudiced unless he has had an opportunity of making a defence.

Being satisfied that the effect of the Canadian provisions is as I have stated, what the Court has to ascertain is whether the appellant had the opportunity of making his defence. In my judgment, he had not. I think that, owing to the dispatch which was used in consequence of the exceptional circumstances—the sitting of the Court being fixed at an unusual hour—those who conducted these proceedings lost sight of the requirements of s. 36 of the Canadian Act of 1908, and lost sight of the fact that a Court cannot visit a man with a penalty until it has first informed him what is the matter in respect of which he is brought to judgment.

In this case there was a searching inquiry conducted by skilled persons with great care and they exposed by a number of questions a great variety of matters on which it would have been quite competent to representatives of the Board of Trade, or any other complainant, to have submitted to the Court that the master was in default in respect of one or more of those matters, but that step never was taken. The investigation was completed by the evidence of the master and the chief officer, and there the matter was left. It may be that it would have been easier for the Canadian Wreck Commissioner if he had had the guidance of a set of rules like that contained in the Lord Chancellor's rules in this country, but that is entirely a matter for the Canadian administration. Those who administer the jurisdiction of Canada are perfectly competent to say whether rules should be laid down to secure definite objects, or whether those objects should be left to be secured by general principles of law. Rules are not laid down in this matter. The Court is left at large as to direct what means shall be taken to secure that the holder of the certificate has an opportunity of making a defence. In the present case, by reason of the exceptional circumstances, the necessity of formulating charges was overlooked. No charges were

1920

THE CHELSTON.

The President.

ever formulated, and the first notice the master had of the charges it was proposed to make against him was in the findings of the Court by which he was found guilty of certain of them.

The decision of the Canadian Court must be quashed, and the master's certificate must be restored free from any suspension. The successful appellant must have the costs of the appeal.

HILL J. I agree.

Solicitors for the appellant: *Ince, Colt, Ince & Roscoe for David Wright Smith, of Glasgow.*

Solicitor for the respondent: *Solicitor to the Board of Trade.*

E. C. T.

1920

July 27.

[ADMIRALTY.]

(IN PRIZE.)

IN THE MATTER OF THE BATTLE OF JUTLAND.

[1920, No. 2035.]

Prize Court—Prize Bounty—Battle of Jutland—Joint and Common Enterprise—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42—*Order in Council of March* 2, 1915.

By an Order in Council of March 2, 1915, pursuant to the provisions of s. 42 of the Naval Prize Act, 1864, His Majesty declared his intention to grant as prize bounty for distribution among such of the officers and crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies "a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement."

On May 31—June 1, 1916, the British Grand Fleet, consisting of 151 ships, fought the German fleet off the coast of Jutland and eleven enemy ships were destroyed. It being impossible under the circumstances to contend that any one ship or squadron was responsible for the destruction of any particular enemy ship, the Grand Fleet agreed that

the battle should be treated as a joint and common enterprise, and, there being in all 4537 persons on board the destroyed enemy ships, the Court decreed that the bounty due to the officers and crews of the 151 ships concerned was the sum of 22,685*l.*

MOTION on behalf of Admiral of the Fleet Viscount Jellicoe of Scapa, Admiral of the Fleet Earl Beatty, and the commanders, officers and crews of 151 of His Majesty's ships for a declaration that they were entitled to prize bounty as being actually present at the destruction of eleven German ships sunk in the battle of Jutland, and that the bounty at the rate of 5*l.* per head for each person on board the enemy ships amounted to 22,685*l.*

The facts were set out in an affidavit sworn by Viscount Jellicoe, the Commander-in-Chief of the Grand Fleet, on May 31, 1916. After setting out the composition of the Grand Fleet and the names of the commanding officers of the 151 ships comprised in it, the affidavit continued as follows :—

"On the said date the British Battle Fleet was cruising in the North Sea accompanied by the 3rd Battle Cruiser Squadron, 1st and 2nd Cruiser Squadrons, 4th Light Cruiser Squadron, 4th 11th and 12th Flotillas. The 1st and 2nd Battle Cruiser Squadrons, the 1st 2nd and 3rd Light Cruiser Squadrons and destroyers from the 1st 9th 10th and 13th Flotillas, supported by the 5th Battle Squadron, were in accordance with my directions scouting to the southward of the Battle Fleet. The Battle Cruiser Fleet was under the command of Earl Beatty (then Vice Admiral Sir David Beatty) G.C.B., O.M., G.C.V.O., D.S.O. in the *Lion*.

"At 2.20 p.m. reports were received by the Battle Cruiser Fleet which indicated the presence of the enemy and at 2.35 p.m. smoke was sighted to the eastwards. I was immediately informed of this and I proceeded [in the *Iron Duke*] with the Battle Fleet with its accompanying cruiser and destroyer force at full speed in a S.E. by S. direction to engage the enemy. The Battle Cruiser Fleet on sighting the said smoke altered course to the E. and subsequently to N.E., and the 1st and 3rd Light Cruiser Squadrons

1920

THE BATTLE OF JUTLAND.

spread to the E. forming a screen for the Battle Cruiser Squadrons and the 5th Battle Squadron.

"At 3.30 p.m. line of battle was formed, the 2nd Battle Cruiser Squadron forming astern of the 1st Battle Cruiser Squadron with destroyers of the 13th and 9th Flotilla taking station ahead. A course was then set E.S.E., and the 2nd Light Cruiser Squadron coming up at high speed took station ahead of the battle cruisers. At 3.31 p.m. five enemy battle cruisers were sighted and the E.S.E. course steered caused the Battle Cruiser Fleet to converge slightly upon the enemy. At 3.48 p.m. the action commenced at a range of 18,500 yards. The 5th Battle Squadron, which had conformed to the movements of the Battle Cruiser Fleet, came into action at 4.8 p.m. at a range of 20,000 yards. The Battle Cruiser Fleet was then steering a course S.S.E. parallel to the enemy. At 4.1 p.m. *Nestor Nomad Nicator Narborough Pelican Petard Obdurate* and *Nerissa* of the 13th Flotilla, *Moorsom* and *Morris* of the 10th Flotilla, and *Turbulent* and *Termagant* of the 8th Flotilla, moved out to attack the enemy with torpedoes and intercepted an enemy force of one light cruiser and fifteen destroyers. After a fierce engagement the British destroyers returned, having compelled the enemy force to retire on their battle cruisers with a loss of two destroyers sunk. *Nestor*, *Nomad*, *Nicator*, *Moorsom*, *Petard*, *Nerissa*, *Turbulent* and *Termagant* pressed home the attack against the enemy battle cruisers.

"From 4.1 p.m. to 4.43 p.m. the action raged fiercely and at 4.18 p.m. one of the enemy vessels was seen to be in flames. At 4.38 p.m. the enemy battle fleet was reported ahead and was sighted in a S.E. direction at 4.42 p.m. The course of the British Battle Cruiser Fleet and 5th Battle Squadron was then altered 16 points to starboard and the said Fleet proceeded on a northerly course. The enemy cruisers shortly afterwards altering course the battle continued. Between 5 and 6 p.m. the battle continued on a northerly course at a range of about 14,000 yards, the enemy receiving severe punishment. At 5.35 p.m. the course steered was N.N.E., the enemy gradually hauling to the Eastward. At

1920

THE BATTLE OF JUTLAND.

this time the British Battle Fleet lay N. 16 W. from the Battle Cruiser Fleet and at 5.56 p.m. the leading battle ships of the British Battle Fleet were sighted by the Battle Cruiser Fleet. The battle cruisers then formed ahead of the Battle Fleet.

"The Battle Fleet came into action at 6.17 p.m. and the enemy was engaged intermittently by the ships of the Grand Fleet till 8.20 p.m. at ranges between 9000 and 12,000 yards. During this time the British Battle Fleet made alterations of course from S.E. to S. and to S.W. and West, the enemy constantly turning away, being evidently anxious to avoid further action in view of the loss that he had sustained. At 7.20 p.m. the 4th Light Cruiser Squadron made an attack upon enemy destroyers, and at 8.18 p.m. they supported the 11th Flotilla in a similar attack. At 9 p.m. the enemy was entirely out of sight, but during the night attacks were made by the 4th 11th and 12th Flotillas upon the enemy, and at 10.30 p.m. the 2nd Light Cruiser Squadron in rear of the Battle Fleet was engaged in a close action with an enemy's force of light cruisers.

"At daylight on June 1, 1916, the Grand Fleet being then to the S. and W. of Horn Reef turned to the N. to search for enemy vessels and remained in the vicinity of the battle-field near the line of approach to German Ports until 11.0 a.m., and at 1.15 p.m., no sign of the enemy fleet being seen, the British fleet returned to port.

"During the said engagement the following enemy vessels were destroyed: *Lutzow*, *Pommern*, *Wiesbaden*, *Rostock*, *Elbing*, *Frauenlob*, *V.* 4, *V.* 27, *V.* 29, *V.* 48, *S.* 35. There were on board the said enemy vessels at the beginning of the engagement 4537 persons in all distributed as follows:—

Ship.	Number on Board.
Lutzow	1450
Pommern	839
Wiesbaden	500
Rostock	480
Elbing	460
Frauenlob	350

1920

THE BATTLE OF JUTLAND.

Ship.		Number on Board.
	Brought forward ..	4079
Destroyers	*V.* 4	85
	V. 27	90
	V. 29	90
	V. 48	98
	S. 35	95
Making a total of		4537

"The destruction of the aforesaid German vessels was solely effected by the combined action of the ships of the Grand Fleet under my command . . . . no other ship or vessel being present or assisting thereat."

Wilfrid Lewis for 120 of the ships. It being impossible under the circumstances of this battle—probably the greatest naval battle in history—to contend that any one ship or squadron was responsible for the destruction of any particular enemy ship, the Grand Fleet have agreed that the battle should be treated as a joint and common enterprise and ask for a decree accordingly.

Carpmael (*Langton* with him) for 31 of the ships, supported the motion.

Mockett (*J. W. Jardine* with him) for the Procurator-General consented.

THE PRESIDENT (SIR HENRY DUKE). The circumstances of the naval action which is the subject of this motion have been referred to by counsel, and the duty of the Court is merely ministerial. It is to ascertain what amount of prize bounty is due in respect of the action and what ships were engaged in it.

The admiration and gratitude of the nation have been properly expressed by those whose duty it is to express them. The gallant Admiral whose affidavit has been read, and all who served under him, have received the thanks of His Majesty and of the Legislature. It is only necessary for me to say that I find and decree that the battle of Jutland was the common engagement and enterprise of the 151 ships of

1920

THE BATTLE OF JUTLAND.

the Grand Fleet, and that is a decree in which those who represent the whole of the Fleet concur. The prize bounty which is due under the regulations is 22,685*l.*

All I desire to add of my own motion is that the record of these proceedings will be one of the most cherished documents in the archives of this Court.

The President.

Solicitors for the claimants : *Woolley, Tyler & Co. ; Wilde, Moore & Co. ; Daniell & Glover ; Botterell & Roche.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. T.

[ADMIRALTY.]

1920

July 28, 29, 30.

[IN PRIZE.]

THE TWEE AMBT.

[1918, No. 1954.]

Prize Court—Neutral Ship and Cargo—Barratrous Intention of Master—Design to take Ship to Enemy Port—Refusal by Crew—No Overt Act.

A Dutch vessel sailed from ports in the Dutch East Indies with a cargo of coffee consigned to the representatives in Holland of the estates on which the coffee was grown. When the vessel reported at Freetown the British naval authorities received information that the master had approached the crew to ascertain whether they would join him in the barratrous enterprise of taking the ship and cargo to Stettin instead of Amsterdam, her port of discharge. The master and the crew were examined, and it appeared that although the master had several times stated that he intended to take the ship to Stettin the crew declined to be parties to the undertaking. The ship and cargo were seized at Freetown, and the Crown claimed their condemnation as prize on the ground that they were bound to an enemy base of supply :—

Held, that although the master entertained the design of taking the ship and cargo to an enemy port, the ship was still on her authorized voyage when seized at Freetown ; that as the crew would not support the master he was not in a position to carry the design into execution

1920

THE TWEE AMBT.

and that it could not be said, therefore, that the destination of the vessel was Stettin. Accordingly, there was no overt act which would subject the ship and cargo to condemnation and there must be an order for their release.

ACTION for the condemnation of the motor schooner *Twee Ambt* and her cargo of coffee on the ground that the destination of the ship and cargo was Stettin, an enemy base of supply.

The *Twee Ambt* was a Dutch vessel which was chartered in March, 1917, by a Surabaya firm to load a cargo of Javanese coffee for carriage to Holland. Permission to ship the coffee was obtained from the Netherlands Oversea Trust Co. (hereinafter referred to as the N.O.T.) which allowed, under arrangement with the British Government, a fixed percentage of the year's coffee crop to be shipped to Holland. The coffee was shipped at various Javanese ports in May, 1917, and was consigned to the representatives of Holland of the estates on which it had been grown. Difficulties were experienced in obtaining a master and crew, but ultimately the *Twee Ambt* left Batavia on August 20, 1917. The route she was to follow was mapped out for her by the British naval authorities.

On her arrival at Freetown, Sierra Leone, on November 8, the master went ashore, and, through his unguarded conversation in the drinking saloons of Freetown, it came to the notice of the naval authorities that instead of taking the ship to Amsterdam the master had formed the intention of taking her to Stettin, and had approached the crew to see whether they would join him in this barratrous enterprise. In consequence of these disclosures the *Twee Ambt* was detained at Freetown, and on February 27, 1918, a writ claiming the condemnation of ship and cargo was issued in the Prize Court of Sierra Leone. On May 29, 1918, the proceedings were transferred to the Prize Court in England.

The evidence of the master and of members of the crew was taken at Freetown and afterwards in London. The crew maintained that the master had approached them with a view of ascertaining whether they would go to Stettin

and that they declined to entertain the suggestion. They stated that the master had many times said that he would take the ship to Stettin. It appeared that on some of these occasions the master was drunk, but he also made the statement when he was sober. The master, in his evidence, did not deny that he had made the statement, but maintained that it was said in jest.

Sir Gordon-Hewart A.-G., *Stuart Bevan K.C.* and *Theobald Mathew* for the Procurator-General.

Hawke K.C and *Le Quesne* for the shipowners.

Inskip K.C. and *Balloch* for the cargo owners.

Artemus Jones K.C. and *Wilfred Lewis* for the N.O.T.

The arguments were mainly directed to the facts. It was contended on behalf of the shipowners and cargo owners that they were entirely innocent parties, and that there was no reported decision in which innocent ship or cargo owners had been condemned in the loss of their property by reason only of the wrongful conduct of the ship-master, except in cases where he had been guilty of some overt unneutral act, such as the carriage of enemy persons or dispatches. For the Crown it was contended that the master had the control of the ship, and that it was the intention of the person who was in control of the destination that was material: *The Louisiana.* (1) The master intended to give the ship and cargo an enemy destination and they were therefore liable to condemnation. [In addition to the cases cited in the judgment *The Alwina* (2), *The Hakan* (3) and *The Svithiod* (4) were referred to.]

THE PRESIDENT (SIR HENRY DUKE). In this case the Crown claims the condemnation of the motor schooner *Twee Ambt*, and her cargo of coffee, on the ground that when she was captured in the port of Freetown in Sierra Leone she was on her way to the port of Stettin in Germany.

The ship is registered under the Dutch flag, and is owned

(1) [1918] A. C. 461, 468.
(2) [1916] P. 131.
(3) [1918] A. C. 148.
(4) [1920] A. C. 718.

1920

THE TWEE AMBT.

The President.

by a company all of whose members are Dutch. The cargo is the produce of the Dutch colony of Java, grown upon a great number of estates in Java, and shipped on board the *Twee Ambt* under circumstances which can be very shortly stated.

In the years 1916 and 1917 there had been established by acts of His Majesty's Government, and with the concurrence to a considerable degree of neutral States and of neutral merchants, a system of control of the import of coffee into Holland, and the control had become continuously more stringent. Holland had been the entrepot through which supplies of coffee had passed in very large quantities into Germany when the German ports were closed, or practically closed, to direct overseas traffic by the action of His Majesty's Navy. For some time the legitimate activity of merchants in Holland in colonial produce from the colonies of their own country, and in colonial products of other countries, had been employed for the purpose of supplying to the German market, and to the German Government, the supplies of coffee which could not be directly obtained. Statistical evidence has been put before me which shows that during a considerable period of the war there was a great volume of trade in coffee proceeding from the Dutch ports, and over the Dutch frontier. That had become progressively more restricted. There had been a limitation of the import of coffee into Holland and there had been a limitation of the export of coffee from Holland. The Dutch Government had enacted, at the time which is material in this case, an absolute prohibition of export of coffee from Holland into Germany. Not only so but the overseas trade with Holland by arrangements made between the N.O.T. and His Majesty's Government had been brought—as well as trade could be brought—into a neutral condition.

I have seen no case during the short period that I have sat in this Court in which the N.O.T. has failed to discharge to the best of its ability the obligation it had undertaken towards His Majesty's Government for the maintenance

1920

THE TWEE AMBT.

The President.

of the neutral character of Holland's trade. It is material in this case that the N.O.T. had had no inconsiderable part in the authorization, and in the organized control of, the adventure which is here in question, so far as it was a legitimate adventure. At the time in question, the import of coffee into Holland overseas had been reduced, so far as Java was concerned, to something like 30 per cent. of its normal volume, and the export from Holland of all coffee, as I have said, had been stopped by the Dutch Government. In these circumstances there was a condition almost of desperation among the planters of Java with regard to the coffee trade. Their produce could not come forward to the ports; there was a restriction upon forwarding; and there was another very serious factor in the business aspect of the matter—namely, that in the Javanese ports at the time in question it was almost impossible to obtain transport. The available transport of the mercantile marine world had been greatly reduced and produce lay—as appears from the correspondence in this case—awaiting transport for periods which tended to reduce and, in some cases, to destroy its value. That was broadly the state of things in Holland and in Java, and in the relations between the Dutch Government and the Dutch mercantile community—through the N.O.T. and His Majesty's Government—at the time when the adventure here in question was undertaken in the summer of 1917.

The coffee trade of Java was carried on in a manner which it is desirable perhaps very shortly to state. The planters were, and apparently are, financed to a considerable extent by great mercantile firms in the home country—namely, Holland. Advances are made for the production of the crops. Those advances continue up to the time of the shipment of the crops, and in the normal course the Javanese planter is engaged in a joint enterprise, when his crops come to hand and are ready for shipment, with the great mercantile houses in Holland who finance, and in a considerable degree control, the trade of Java in coffee. Three of those houses are concerned in these present proceedings. I need

1920

THE TWEE AMBT.

The President.

not enumerate the very great body of planters who are concerned. They have put in their separate claims, but the litigation has been directed quite obviously by three large Amsterdam houses, and chiefly by the Koloniale Bank at Amsterdam, by reason of the fact that the mercantile transactions of the planters were in the hands of those houses in Amsterdam.

That being the state of the case, in 1917 coffee was lying ready for shipment and, to a limited amount, coffee could come forward for shipment. Shipping could not be found, but with great difficulty the Amsterdam houses made an arrangement—an arrangement initiated in the first instance by the Koloniale Bank—whereby the *Twee Ambt*, which had found her way to Java and was in some difficulties there, was made available for the transport of that limited quantity of coffee for which transport could be arranged. The Koloniale Bank, not having supplies of coffee in sight which would completely load the *Twee Ambt*, communicated with some of the other houses—two of the other houses in particular who are here concerned—and ultimately between them they found cargoes sufficient to load this vessel. Communications then took place between Java and Amsterdam, and the responsible people in Amsterdam in the first instance met the proposal to load the *Twee Ambt* by a statement that it would be either impossible or illegal to do so. There were further communications between the mercantile houses and the N.O.T., and after a delay the enterprise of forwarding the cargo of Javanese coffee on board the *Twee Ambt* was accepted by the managers of the N.O.T. as a transaction for which they would become responsible. It is not immaterial to observe that one of the most prominent of the business men who were engaged in the concern —a gentleman who was called here before me, a banker of Amsterdam—was a very active member of the governing council of the N.O.T. Arrangements were made for the transport of the cargo to Amsterdam, within the restrictions which had been established by His Majesty's Government, by the Dutch Government, and by the N.O.T. Having

1920

THE TWEE AMBT.

The President.

arrived at that stage, the persons in charge of the business got into communication with the naval authorities of this country; they notified the naval authorities of the intended voyage and of the whole facts of the case, and they secured the sanction of the naval authorities for the voyage in question and had a route mapped out upon which they had to dispatch their ship, and upon which they did dispatch her. They were to make their voyage to Freetown, calling there for examination by the British authorities; to proceed from Freetown to the North Atlantic, round by the north coast of Scotland, coming down the North Sea, and by that route making their way to Rotterdam. So far as the business people in this case are concerned—apart from two whom I will mention presently—that programme was not only mapped out but it was entered on, and it was at all times intended honestly to be carried out. In that state of the case the vessel sailed on an authorized voyage with an authorized cargo of coffee for import into Holland.

During that part of the voyage which brought the vessel to Freetown there were some very extraordinary happenings. The master was a young man of 30 whose history perhaps illustrates the difficulty there was during the later periods of the war in obtaining trustworthy commanders for merchant ships in remote, and especially in tropical, countries. It seems to me that the master was probably as untrustworthy a master as the owners could well have obtained. I daresay that he was the best man that those on the spot could get. But it is evident that he was a man entirely reckless, that he had not much self-respect, not much regard for his duty, and apparently not much regard for the interests of his owners; and he had very little conception of the manner in which a sensible ship-master maintains his proper relations with his crew. I daresay it may be true that crews shipped, as the crew of this vessel was, are found not to be the best specimens of seamen. One of the witnesses said that crews shipped in the way in which this crew was shipped are always found drunk. Be that as it may, the master and the crew were frequently at variance long

1920

THE TWEE AMBT.

The President.

before the vessel got to Freetown. There were various causes for it—it is unnecessary to examine them—but there were violent personal differences between the master and the crew. While the undoubted conduct of the master must be given its true effect, absolute confidence cannot be reposed, it seems to me, in the statements of people who confess themselves his enemies and who had very serious grievances against him.

When the vessel had arrived at Freetown and was under the supervision of the naval authorities there, the master found his way ashore. He had not provided the crew with means of satisfying their favourite inclination—that for strong drink. Apparently they had had no advances and that was one cause of difference between him and them. But he himself found his way ashore, and in drinking saloons in Freetown he was guilty of some extraordinary conduct. It was there that the master made known, in the course of conversation, and in the presence of various people, that he had been minded, and probably was then minded, to take the *Twee Ambt* to a German port. It was because of statements of the master—not of the crew, I think—that this matter originally came to be taken in hand by the naval authorities and the port authorities at Freetown. When the master had made his unguarded statements with relation to the war, and his views with regard to his ship and what he might do with her, the crew came to be examined, and the crew—which was I think in a semi-mutinous condition and at all events was wholly at variance with the master and not under the ordinary control of the master—related to the British authorities at Freetown the happenings there had been in the course of the voyage so far as it had gone. It appeared—and I am satisfied that it was the case—that when the master was a few days out from the Javanese port he had seriously approached members of the crew to sound them as to whether they would engage with him in a barratrous enterprise of taking the vessel to Germany with her cargo. That, to my mind, is the serious element in this case. The crew—every man of them—

refused to be parties to any such undertaking, and that, in my opinion, is a material fact. If this had been a case where the crew had entered into the design of the master, very different considerations would, according to my view of the facts, have arisen. The crew repelled the suggestions of the master, and they were at increasing variance with him until they arrived at Freetown, and at Freetown they disclosed all he had said to them.

It is alleged against the crew that they disclosed more than the master had said to them, but their evidence raised a case against him which, to my mind, is not satisfactorily displaced so far as he is concerned, to the effect that he had conceived—and that he entertained—the design of taking this vessel, if he found his way to do so, to a German port. He was called at Freetown—he was examined here afterwards—and he made a variety of frivolous statements as to these allegations against him, which are as grave almost as could be made against a ship-master. They were allegations that he had engaged in a scheme of barratrous conduct, which would not merely result in the dishonest expropriation of his owners' property, but conduct which, if it were carried to its intended issue, must have resulted in the forfeiture of their ship and of the forfeiture of the goods she was carrying. These allegations are not displaced by the owners' evidence. That was the situation, and that is my view of the facts at the time of the inquiry at Freetown, and I have to consider what results from that conclusion.

It is said for the Procurator-General that what is established is that the destination of this vessel while she was in the port of Freetown was the enemy port of Stettin, and I have to consider whether that is the fact. I am inclined at present—it is not necessary to examine the subject with minute care in view of my general conclusions—but I am inclined to take the view that if in fact the destination of this ship while she was at Freetown was Stettin I ought to condemn the ship and cargo. I will not discuss this matter at length ; but it is true that in a variety of decisions in Prize innocent owners of ships and cargoes have been

1920

THE TWEE AMBT.

The President.

involved, by reason of their confidence in the ship's master and the nature of his employment, in a liability to condemnation arising out of his acts. There are a variety of cases which may be referred to in this connection. I examined them quite recently in the group of cases known as *The Kim*, *The Alfred Nobel and The Björnstjerne Björnson.* (1)

It is said by Mr. Bevan that once it is found that the master of a vessel has the intention to take his ship to an enemy destination in such a way as to subject it to condemnation, the vessel is subject to condemnation. Mr. Bevan read from *The Louisiana* (2) this passage: "It is the intention of the person who is in a position to control the destination which is really material." I am bound by the decision of the Privy Council in *The Louisiana* (2) to its full extent, and I should not for a moment shrink from applying it, but I have to consider what it means. It is one of many decisions relating to a variety of cases in which owners of ships and of cargoes may become liable, beyond their own intention, for conduct of their agent, the master. There are a great variety of cases—it is unnecessary to recapitulate them—but the most extreme case which is within my recollection is that in which the owners were held liable in the condemnation of their vessel by reason that the master against his will had been compelled to engage in the unneutral undertaking of carrying enemy forces and enemy papers. Cases of that kind, and cases such as those to which Mr. Bevan referred, e.g., *The Panaghia Rhomba* (3) in particular, where the ship and the cargo had been held liable to condemnation, notwithstanding absence of proof of knowledge on the part of the owners of ship or cargo, where it was found that the ship had been engaged in an actual breach of blockade, are those which I am asked to apply together with what is said to be the principle stated in the passage to which I have referred from the judgment in *The Louisiana* (2) to the facts of the present case.

(1) Ante, p. 319. (2) [1918] A. C. 461, 468.
(3) (1858) 12 Moo. P. C. 168.

1920

THE TWEE AMBT.

The President.

How does the matter really stand? I will examine what ground there is, apart from dicta in Prize law, for condemning the owners of this ship and the cargo. The owners are a body of mercantile men—neutrals—who engaged, with the sanction of His Majesty's Government, in a neutral undertaking, the conditions of which, imposed by His Majesty's Government, they carried out with scrupulous regularity. That is the position of the owners, and I accept—it has hardly been challenged on the part of the Crown—the evidence presented by the shipowners and the cargo owners with regard to their conduct in this case, and their intentions. That is the position of the shipowners and of the cargo owners. If I condemn the ship or the cargo, I must condemn them because of acts which the owners did not in fact authorize and which were so far outside the authority of their agent, the master, that they would be, so far as they are established, criminal acts on his part.

It is quite true that in some Prize cases passages will be found in which it is said that although the act done was an act of barratry, nevertheless the ship and the cargo must pay the penalty. But in every case, so far as I am aware, the penalty was incurred only by the act done. I have to consider whether upon the broadest views of the authorities there was an act done here which subjects this vessel and her cargo to condemnation. What was done by the master was to conceive, and to take steps at sea—between Batavia, the Javanese port, and Freetown—to ascertain the views of members of his crew as to engaging in, a barratrous enterprise. That was what was done, accepting the evidence of the Crown at its full value. Now does that constitute such an act as renders it necessary in this Court to condemn the ship and cargo? Of course they both stand on the same footing. In my judgment, it does not. The design of the master, however criminal it might have been, was never carried into practical effect. There is no overt act on the part of the ship which warrants my saying that this ship had been brought into the prosecution of an unneutral undertaking. She was on her authorized voyage, and she

1920

THE TWEE AMBT.

The President.

was subjected, in due course, to the control which the British authorities had provided for her. In my opinion there is no evidence which would warrant me in saying that at Freetown the master entertained the design at all costs of going to Stettin; I think it was in contemplation and was not a design definitely adopted; and I am satisfied, as a matter of fact, upon the proofs before me, that the master never could have carried the crew with him in any undertaking of that kind; and so, in point of fact, I say that whatever the criminal design or the criminal wishes of the master, and however unneutral the mind of the master, he never was in a position to carry his designs into execution, he never in fact began to carry them into execution, and he never could have carried them into execution.

Those, broadly, are the grounds on which, in my opinion, it would be wrong to say that this ship was in fact, when she was in the port of Freetown, destined for Stettin. I hold, therefore, that she was destined for Rotterdam, that Rotterdam was her destination in intention and also in fact, on the part of the only persons who had the power to carry out their intentions, and I am satisfied that she would have duly arrived at Rotterdam. I propose, therefore, to decree the release of the ship and the cargo.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for the ship owners: *Botterell & Roche.*

Solicitor for the cargo owners and for the N.O.T.: *Albert M. Oppenheimer.*

E. C. T.

[ADMIRALTY.]

[In Prize.]

1920

July 13.

THE DIRIGO.

[1916, No. 1033.]

Prize Court—Security for Costs—Charging Order—Priorities—Costs of Procurator-General and Claimants' Solicitors—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

A sum of 500*l.* was paid into Court by claimants as security for the costs of their appeal to the Privy Council against a judgment of the Prize Court condemning their vessel for the carriage of contraband. The appeal was abandoned. Thereupon cross summonses were issued: (*a*) by the claimants' solicitors for payment out of the sum in Court; (*b*) by the Procurator-General for a charging order on the sum in Court, on the ground that the unsecured balance of the taxed costs of the Crown in the proceedings in the Prize Court would absorb the whole sum remaining after taxation of the Crown's costs in the abandoned appeal. The claimants' solicitors contended that, at any rate so far as their own costs were concerned, they had a prior claim upon the fund in Court:—

Held, that as the solicitors had neither recovered nor preserved the fund the equitable jurisdiction of the Court did not apply in their favour, and that the Procurator-General's application for a charging order upon the whole fund must be allowed.

Cross Summonses heard in chambers and adjourned into Court for judgment.

The sailing ship *Dirigo*, owned by the claimants, J. W. McNear, Inc., of San Francisco, was condemned as prize for the carriage of a full cargo of contraband. (1) The claimants gave notice of appeal, and as a condition of their appeal paid into Court the sum of 500*l.* as security for costs. They subsequently abandoned the appeal and their solicitors accordingly took out a summons for payment out of the security. Thereupon the Procurator-General took out a cross summons asking for a charging order upon the fund, upon the ground that in respect of the Prize Court proceedings the claimants had only been ordered to give security in the

(1) [1919] P. 204, 224.

1920

THE DIRIGO.

sum of 100*l.*, and that the unsecured balance of the Crown's taxed costs in those proceedings would absorb the whole sum remaining after the payment of the costs in the abandoned appeal. The claimants' solicitors contended that in any event under s. 28 of the Solicitors Act, 1860, they had a prior claim upon the fund in respect of their own costs.

C. R. Dunlop K.C. for the claimants.
Clement Davies for the Procurator-General.

Cur. adv. vult.

THE PRESIDENT (SIR HENRY DUKE). In this case there were cross summonses with regard to a sum of 500*l.* which had been paid into Court by the claimants under an order of this Court as security for the costs of the claimants' proposed appeal to the Privy Council against the judgment of this Court.

The appeal has been abandoned, and thereupon the claimants' solicitors issued a summons asking for payment out of Court of the sum in Court subject to the provision of the costs of the Procurator-General in the abandoned appeal. Following upon that summons, the Procurator-General issued a summons asking for a charging order upon the sum of 500*l.*, subject to his own costs of the appeal; proceeding under the equitable jurisdiction of the Court—a jurisdiction about which there is, of course, now no question. That is illustrated in *Brereton* v. *Edwards* (1), to which Mr. Clement Davies called my attention. The principle there laid down is that if the debtor is entitled to property which cannot be reached by fi. fa., or other process of execution at law, the judgment creditor is entitled ex debito justitiæ to an order charging such property with the amount of his judgment debt, and that charge is effective to secure the ultimate payment to him out of the property so charged. It has been said that the power to make that order is a discretionary power, but although the conclusion not to exercise it may arise in cases where the order

(1) (1888) 21 Q. B. D. 488.

1920

THE DIRIGO.

The President.

will not be fruitful, and although the order will not be made contrary to general principles of justice, I take the law to be that a judgment creditor, who is aware of property of his debtor which is immune from legal process of execution, and which can be made the subject of a charging order, is entitled to have such a charging order. I take that to be the general position, subject to such qualifications as those I have referred to.

When the Procurator-General's application for a charging order had been supported before me, Mr. Dunlop, who appeared for the claimants, asked that his clients—the solicitors who were instructing him for the claimants—should be heard to maintain a claim to make the whole of the 500*l.* in the first instance available to secure their costs of the appeal to the Privy Council. The position with regard to the respective claims is this: that, assuming priority is due to the Procurator-General, his taxed costs of the proceedings in this Court which remain unpaid will absorb the whole sum remaining after taxation of his Privy Council costs, and there will still be a balance in which the claimant will be indebted to him upon his costs in this Court. So that the question is one of priority. The costs of the solicitors in connection with the proceedings in the Privy Council are not very great—they amount to some 50*l.* or 60*l.*—and the fund is obviously available in satisfaction of those costs in priority to the claim of the Procurator-General if the solicitors are properly entitled to have an order made in their favour.

It was because of the form in which the matter was raised at a late stage of the discussion of the question here that I thought it necessary to take time to consider what I ought to do. Owing to the manner in which the question arose there was not an opportunity of referring me to authorities, and I had not the authorities sufficiently clearly in my mind to have a definite view as to what I ought to do. Mr. Dunlop put it first on the ground of lien, and then he put it on the ground of the equitable jurisdiction of the Court. Moreover, there is the general principle with regard to costs of solicitors which is often put into operation in decisions of the Court. These are

1920

THE DIRIGO.

The President.

to this effect: that where a solicitor has been instrumental in bringing a fund into existence, or in preserving a fund, for a very long period of time it has been the practice of our Courts—and not only the practice in equity, but I think it will be found in some decisions in the old common law Courts—that the Court will protect the interests of its officer who has been so instrumental. What Mr. Dunlop said to me was that although it might be true, as was urged against him, that there could be no lien here by reason that the fund was not in the possession of the solicitor, nevertheless there was an equitable claim upon the fund created or preserved by the exertions of the solicitor. That head of claim has been dealt with for a long time now under s. 28 of the Solicitors Act of 1860, and the section has fortunately been expounded in numerous decisions. It provides that "In respect of property recovered or preserved in a suit, matter, or proceeding, the Court may declare the attorney or solicitor entitled to a charge upon and to a right of payment out of the property recovered or preserved through the instrumentality of any such attorney or solicitor for the taxed costs charges and expenses of or in reference to such suit, matter or proceeding." It is not necessary to refer to numerous decisions; but there are two cases in the Court of Appeal in one of which the solicitor's claim to charge was enforced, and in the other of which it failed—namely, *Bulley* v. *Bulley* (1) and *Greer* v. *Young*. (2) In both of those cases the principle which is applicable was considered, and it was laid down broadly and generally that the right which is either recognized or created under the statute is in the nature of a salvage right, and that what entitles the solicitor to a charge is that the property or fund shall have been recovered or preserved by the instrumentality of the solicitor and have been so recovered or preserved "in the proceedings." It appears from the judgments of the Lords Justices in both these cases, and from other authorities, that, the right being in the nature of a salvage right, the solicitor may recover against the fund beyond the interest of his own client. Bowen L.J. says in the second of the two

(1) (1878) 8 Ch. D. 479. (2) (1883) 24 Ch. D. 545.

cases—*Greer* v. *Young* (1)—in interpreting the section: "The section is a very general one. It applies to every case in which a solicitor is employed. It authorizes a charge not on the mere interest of the plaintiff but on all property recovered in the action whatever, for the plaintiff only, or for him in connection with others. It appears clear to me that it is a salvage section. The solicitor is treated as a salvor who has recovered or preserved something in a time of danger by his work and labour." That brings the case to this position, that if I am satisfied on the facts that this fund is brought into being or is preserved by the activity of the solicitor he is entitled to have a charge upon it although there is a claim of his client's opponent which would have absorbed it.

I have to consider here whether this is in truth a fund such as is referred to—"a fund recovered or preserved" by the activity of the solicitor in the proceedings. I have come to the conclusion that it is not. The fund was ordered to be brought into Court as a condition precedent to the prosecution of an appeal at the instance of the Procurator-General. The Procurator-General was the first actor in the matter. The fund was brought into Court because the Court ordered it to be brought into Court. It was not recovered by any activity of the solicitor. His duty was, under the circumstances which then existed, if he could, to defeat the application of the Procurator-General, and to induce the judge who made the order either to make no order, or to make a less order. Now, that is the state of things as to the origin of the fund. What has taken place since has been that the fund has been paid into Court—no doubt paid into Court by the solicitor, but not paid into Court as the result of his exertions on behalf of the parties generally, or of his exertions on behalf of his own client, but paid into Court in pursuance of a duty to pay it into Court, in course of his professional duty, as money entrusted to him by his client for that purpose.

If the fund had been in truth a fund which was recovered or preserved by the activity of the solicitor, and supervening upon that the Procurator-General brought this claim, I should

(1) 24 Ch. D. 545, 556.

1920

THE DIRIGO.

The President.

have been glad to have recognized and enforced the claim on the part of the solicitor. But I come to the conclusion, regarding the facts from what I hope is a commonsense point of view, that the solicitor neither recovered nor preserved this fund, and that the equitable jurisdiction of the Court does not apply in his favour.

I therefore dismiss the application of the solicitor for a charge upon this fund for his costs, and I allow the claim of the Procurator-General for a charging order upon the fund for the balance of the costs of the Procurator-General in the suit in this Court. The Procurator-General must have the costs of his application, but I make no order as to any other costs.

Solicitors for the claimants : *Thomas Cooper & Co.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. T.

1920

July 14, 22.

[ADMIRALTY.]

[IN PRIZE.]

THE UNITED STATES.

[1915, No. 58 R.]

Prize Court—Release of Goods detained under Reprisals Order—Expenses of Detention—Insurance—Reprisals Order in Council of March 11, 1915.

A quantity of goods were seized under the Reprisals Order in Council of March 11, 1915, from the parcels mail of a neutral vessel bound from Copenhagen to New York, and decrees were made that the goods were of enemy origin and were enemy property and they (or their proceeds if sold) were ordered to be detained until the conclusion of peace or further order.

Various claimants, American citizens, who had submitted to these orders either without entering appearances or without objection at the hearing, claimed that, peace having been concluded, they were entitled to the release of the goods or their proceeds; and they filed evidence to show that according to the law applicable to mercantile transactions in time of peace, though not under the rules of international law

1920

THE UNITED STATES.

applicable to the passing of property in goods forwarded by sea in time of war, the goods were at the time of seizure the property of the respective claimants. The Attorney-General thereupon waived the rights of the Crown in respect of the declarations of enemy ownership and consented to orders for release, but claimed that any order for release should be conditional upon payment by the claimants of the expenses of detention and the premiums paid for the insurance of the goods:—

Held, (*a*) that the seizures and detention being consequent upon shipments presumably made with knowledge of the Order in Council and of the measures directed to be taken thereunder, the releases ought to be subject to the terms that the expenses properly and necessarily incurred in the discharge, detention, and sale of the goods should be borne by the claimants;

(*b*) that the Marshal being charged with the safe-keeping of the goods for the sole purpose of eventual restitution, insurance was a necessary precaution in the interests of the owners of the goods, and not in the interests of the Crown as in the case of goods seized and claimed to be subject to condemnation as prize, and accordingly that the cost of the insurance must likewise be borne by the claimants.

CLAIMS by American citizens for the release of goods or their proceeds detained under the Reprisals Order in Council of March 11, 1915, as being goods of enemy origin or enemy property.

The goods in question consisted of machine needles, saws, laces and embroideries, which were seized at Kirkwall ex the parcels mail of the Danish steamship *United States* in the course of her voyage from Copenhagen to New York in December, 1915.

The several claimants submitted to the form of order settled in the *United States* (claim of the American Bead Co.) (1) without appearing or without objection at the hearing of the Crown's applications for decrees under the Order in Council; and in each case at various dates in 1917 decrees were made that the goods were of enemy origin and were enemy property, and they (or their proceeds if sold) were ordered to be detained until the conclusion of peace or further order.

On June 3, 1920, the present claimants and several others moved the Court for an order that the decrees obtained in 1917 should be "varied so far as the goods are declared to be enemy property"; for leave to file evidence in support of their claims to the ownership of the goods; and for their

(1) [1917] P. 30.

1920

THE UNITED STATES.

release. The Court gave the necessary directions, and the claimants filed evidence to show that under the law applicable to mercantile transactions in time of peace the goods were the property of the respective claimants at the date of seizure.

Sir Gordon Hewart A.-G. (*Sir Ernest Pollock S.-G.* and *James Wylie* with him) for the Procurator-General. Having regard to the decision of the Privy Council in *The Noordam* (No. 2)(1) the Crown does not propose to rely on the declarations of enemy property as an answer to the claims for release in cases where the Court is satisfied that according to the law applicable to the passing of property in time of peace the seized goods would have been the property of the claimants, although according to the rules of international law applicable to the passing of property in time of war the goods would still be enemy property. But the release in each case should be subject to the deduction of all costs, charges, and expenses relating to the seizure and detention including the cost of insurance. In *The Cairnsmore* (2) it was held that the owners of goods seized under a claim for condemnation and afterwards released are not liable for the insurance premiums. That decision does not apply in the circumstances of these cases as the insurance is for the benefit of the claimants and not (as in *The Cairnsmore*) for the benefit of the captor.

Raeburn K.C. and *Wilfred Price* for the claimants. Claimants are entitled as of right to the release of goods which were not enemy property at the date of the Treaty of Peace: *The Oscar II.* (3), and there is nothing in the Reprisals Order in Council which imposes on claimants the burden of having to pay the expenses of the seizure and detention of their goods; the claimants therefore should not be compelled to pay for something as to which the Order is silent: cf. Lord Sumner's observations in *The Noordam.* (No. 2).(1) The Order prima facie is an encroachment on the rights of neutrals, and after

(1) [1920] A. C. 904. (2) Ante, p. 290.
(3) Ante, p. 363.

1920

THE UNITED STATES.

the conclusion of peace, when the Order ceased to have effect, claimants should be entitled to receive the proceeds of their goods in full. As regards the cost of insurance, these are even stronger cases than *The Cairnsmore.* (1) If, where condemnation is sought, claimants are not liable for the cost of insurance when the goods are released, a fortiori they should not be liable when merely detention and sale are sought.

Sir Gordon Hewart A.-G. in reply. Art. 4 of the Reprisals Order provides that the proceeds of goods sold under the order shall be paid into Court and "dealt with in such manner as the Court may in the circumstances deem to be just." In *The Stigstad* (2) it was held that innocent shipowners were not entitled to recover the losses sustained through the detention of their vessel while cargo seized under the Reprisals Order was being discharged. A fortiori, a claimant to the goods themselves, ex concessis rightly detained under the Order, cannot reasonably expect to receive the gross proceeds. Just as, in the case of warehoused goods, the warehouse keeper has a lien for his charges, so in these cases the necessary expenses of keeping the goods should be deducted. As regards insurance, in several cases where the goods have been destroyed by fire, claimants have received the money payable under the insurance policies. The insurance was not effected in the interest of the Crown but of the claimants, and it is just that the cost should be borne by the claimants.

Cur. adv. vult.

July 22. THE PRESIDENT (SIR HENRY DUKE) read the following judgment:—These are three claims by traders domiciled in the United States of America for the release of goods or their proceeds in the custody of the Marshal after seizure at sea on board a Danish vessel by His Majesty's naval forces, under the Reprisals Order in Council of March 11, 1915. A large number of similar claims are outstanding, and these cases have been selected for early disposal in order

(1) Ante, p. 209. (2) [1919] A. C. 279.

1920

THE UNITED STATES.

The President.

that the principles generally applicable to such claims may be determined.

Each of the seizures now in question was followed in due course by the issue of a writ in Prize framed under the Reprisals Order claiming—"an order for detention and/or sale of the goods seized being goods of enemy origin or being enemy property on board the steamship *United States* which sailed from a port other than a German port after the 1st March, 1915, and for payment into Court of the proceeds of sale of the said goods to be dealt with as the Court may in the circumstances deem to be just (if such goods shall not before such order be requisitioned for the use of His Majesty)." In each case at various dates in 1917 the order sought by the writ was made and it was declared in each case that the goods were of enemy origin and were enemy property. The order was for detention until the conclusion of peace, with liberty to the Crown to apply for an order for sale and detention of the proceeds. The form of order was that settled by the President (Sir Samuel Evans) in *The United States* (American Bead Co. and other claimants). (1) The claimants in all the various cases (these and others) submitted to an order in this form either without appearing or without objection at the hearing.

On June 3 last the Court was moved on behalf of the present claimants and numerous others that the decrees or orders made in their several cases should be "varied so far as the goods are declared to be enemy property," and for liberty to enter appearance where no appearance had been entered, and to file evidence in support of their claims to ownership of such goods and to have their claims heard and determined by the Court. After argument I allowed appearances to be entered and gave directions for delivery of pleadings and exchange of documents, in three selected cases, and for an early hearing, and reserved to the Crown whatever rights were created by the declarations of enemy ownership already made.

At the hearing of the cases now in question, evidence was

(1) [1917] P. 30.

produced that under the law applicable to mercantile transactions in time of peace—though not under the rules of international law which apply to the passing of property in goods forwarded by sea in time of war—the goods in question were at the time of seizure the property of the respective claimants. The Attorney-General, thereupon, waived the rights of the Crown in respect of the declarations of enemy ownership heretofore made by the Court, and consented to orders for release, if the Court were satisfied that the claimants were, according to municipal or mercantile law, owners at the time of seizure; but he claimed that any order for release should be conditional upon payment by the claimants respectively of the necessary expenses of detention. He urged further that the expenses to be paid by the claimants ought to include premiums paid for the insurance of the goods.

The argument for the claimants as to the costs of bringing in, unloading, warehousing and delivery was that these seizures were self-regarding acts of a belligerent power, not provoked by any previous action of the claimants, or warranted by any infraction of the ordinary rights of belligerents. The expense of such proceedings, it was said, ought not to fall upon neutrals, but ought rather to be borne by the belligerents.

As to insurance premiums, counsel for the claimants relied upon the usual practice in prize under which in ordinary circumstances, expenses which have been incurred for insurance of goods afterwards ordered to be released are not charged upon the goods.

Questions of some difficulty would have arisen if the Procurator-General had insisted upon the declarations of enemy ownership heretofore made in their full possible effect. It would have been necessary to consider, for example, the clauses of the Treaty of Versailles in relation to enemy property situate in the United Kingdom when peace was concluded. Under the circumstances, these matters need not be further examined. It is sufficient to say that the goods were rightly detained and are now to be released.

The question of expenses is to be determined upon

1920

THE UNITED STATES.

The President.

consideration of the terms of the Order in Council and with due regard to the settled practice of the Court. The claimants in their several statements of claim assert that the detention of their respective parcels of goods was wrongful. It is impossible that I should so hold. The validity of the Order in Council in point of international law has been definitely established in the highest Tribunal, and its requirements must be observed in dealing with the present controversy.

The material provisions of the Order are that goods detained thereunder shall be restored at the appointed time upon such terms as this Court may deem to be just, and that the practice of the Court in its jurisdiction in prize shall so far as applicable be followed.

The power of the Court as to the incidence of expenses incurred about the seizure, sale, detention, and restitution of goods which come into the custody of the Marshal after capture is complete, and under the Order in Council the power of the Court is to be exercised as justice may in each case require. I think this has always been so in the ordinary jurisdiction in prize. Any general principles which have been stated appear always to have been so applied in the exercise of the discretion of the Court as to meet the justice of particular cases as they arose. *The Resolution* (1) supplies an instance in which captors' and claimants' expenses alike were borne by the Crown upon a requisition of goods seized as prize and afterwards ordered to be released. Reference to *The Narcissus* (2); *The Catherine and Anna* (3); *The Industrie* (4); *The Peggy* (5); and *The Asia Grande* (6), furnish other illustrations of the complete authority of the Court to determine the ultimate incidence of expenses incurred in relation to prize.

Although the goods here in question were not claimed for condemnation they are in some particulars similarly circumstanced to goods so claimed. They were rightfully seized unladen and detained, and if sold were rightfully sold. Their

(1) (1802) 4 C. Rob. 166n.
(2) (1801) 4 C. Rob. 17.
(3) (1801) 4 C. Rob. 39.
(4) (1804) 5 C. Rob. 88.
(5) (1804) 5 C. Rob. 90n.
(6) (1808) Edw. 45.

seizure and detention, where it took place in course of any voyage which began after the publication of the Reprisals Order, was seizure and detention consequent upon shipment presumably made with knowledge of the Order and of the measures directed by the Crown to be taken thereunder. Discharge in a British port of goods within the prohibitions in the Order, custody of the Marshal, and sale by order of the Court if necessity arose, were things which notoriously involve expense—expenses of unlading and warehousing in all cases and expenses of sale in some. On behalf of the Crown it was contended also that in the circumstances of the war, insurance was an expense which no prudent custodian of the merchandise of others would feel at liberty to omit. The question between the Crown and the claimants is whether these expenses ought to be borne by the goods and proceeds now to be released. Whether the matter is considered generally under the Order in Council, or in the light of the practice of the Court in prize, the terms upon which it is just that the goods should be released are, in my view, terms of payment by the claimants of the expenses properly and necessarily incurred in the handling of their respective parcels.

As to insurance, it is the fact that under ordinary circumstances goods in the custody of the Marshal under a claim of condemnation do not on release bear the expenses of insurance, where these have not been incurred by order of the Court or at the request of the claimant. This practice results from the relative positions of the captor and the claimant with regard to the property in the goods, and from the obligations properly belonging to the Marshal. Goods held by the Marshal for an owner who by his own act has subjected his property to detention seem to me, however, to be subject to other considerations. No captor has an interest in them. The Marshal is charged with their safe keeping for the sole purpose of eventual restitution. He has incurred expenses of insurance, upon a system recognized in the Registry and with the result, as I was reminded by the Attorney-General, that from time to time various claimants have received policy moneys for goods which, without any

1920

THE UNITED STATES.

The President.

negligence, had been destroyed, and as to which they would otherwise have suffered a total loss. Insurance was a wise and almost indispensable precaution in these cases in the interest of the owners of the goods. It was in that interest only that insurance was effected. The facts differ widely from those under which the Court has refused to charge upon goods seized as prize and afterwards ordered to be released the cost of insurances effected by or on behalf of captors. In my opinion, it is just that the costs of the insurance here in question should be borne by the owners of the goods, and I direct that it shall be so borne.

Outside of the main question of expenses I was asked on behalf of the Procurator-General for some expression of opinion as to the conditions under which detained goods should ordinarily be released, and, in particular, as to proofs of ownership to be required and precautions proper to be taken to avoid claims by persons not now upon the scene. As to these matters, I do not think it is necessary to say more than that the Procurator-General is under no obligation to consent upon his own responsibility to the release of goods where the title of a claimant is not established to his reasonable satisfaction.

The order proper to be made in each of the three cases before the Court is an order for restitution to the several claimants, upon payment in each case of the expenses properly incurred including costs of insurance, the amount of such expenses in case of dispute to be determined in the Registry.

Solicitors for the claimants : *Thomas Cooper & Co.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. T.

[IN THE COURT OF APPEAL.]

C. A.
1920
July 12.

MacLULICH *v.* MacLULICH.

Divorce—Practice—Petition for Restitution of Conjugal Rights—Answer—Traverse—Affirmative Allegations—Right of Petitioner to Particulars.

In a suit for restitution of conjugal rights, the wife by her petition alleged that the husband withdrew from cohabitation with her, and had kept and continued away from her without any just cause whatsoever, and had refused and still refused to render her conjugal rights. The husband by his answer denied that he had without any just cause withdrawn from cohabitation or that he had refused or still refused "without reasonable cause" to render to the petitioner conjugal rights. On an application by the petitioner for particulars of the respondent's answer on the ground that such pleading was embarrassing:—

Held, that the answer was not a mere traverse by the respondent of the allegation in the petition, but involved affirmative allegations by him that he had "just cause" for withdrawing from cohabitation and "reasonable cause" for refusing to render conjugal rights, and that the petitioner was therefore entitled to particulars of any charges or facts on which the respondent relied as justifying his conduct.

Decision of Sir Henry Duke P. affirmed.

APPEAL from an order of Sir Henry Duke P. in chambers, reversing the order of the Registrar.

The wife by her petition, filed on January 31, 1920, prayed for a decree for restitution of conjugal rights.

Para. 3 alleged: "That the said James Mecredy MacLulich did on the 10th day of March, 1918, withdraw from cohabitation with your petitioner, and has kept and continued away from her without any just cause whatsoever, and from thence hitherto has refused and still refuses to render her conjugal rights."

The husband by his answer, filed on May 25, 1920, in para. 2 alleged: "That he denies that on the 17th March, 1918, or on any other date he has without any just cause withdrawn from cohabitation or that he has refused or still refuses without reasonable cause to render to the petitioner conjugal rights as alleged in paragraph 3 of the said petition or at all."

On June 7, 1920, the petitioner took out a summons asking that para. 2 of the answer should be struck out or in the

C. A. 1920 MacLULICH v. MacLULICH.

alternative that further particulars should be given. The summons came before the Registrar on June 11 and was dismissed by him. The petitioner appealed and the appeal was heard by Sir Henry Duke P. in chambers on June 21, who made an order that the decision of the Registrar should be varied and that the respondent should within ten days deliver particulars of his answer therein. He also gave leave to appeal and certified that he did not require further argument.

The respondent appealed. The appeal was heard on July 12, 1920.

J. B. Matthews K.C. and *H. D. Grazebrook* for the respondent. Para. 2 of the respondent's answer is a mere traverse of the allegations in para. 3 of the petition and does not contain any affirmative allegation. It was therefore contrary to the practice to order the respondent to give particulars of his answer. By r. 38 of the Divorce Rules "Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the registrars in his absence, by summons, and not by motion." It is submitted that the words "matters pleaded" in that rule mean "matters affirmatively pleaded." Rule 7 of Order XIX., though not identical in language is substantially to the same effect as r. 38. Under that rule it was held that where the onus of establishing a positive or negative negation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation: *Weinberger* v. *Inglis*. (1)

[YOUNGER L.J. referred to r. 6 of Order XIX.

WARRINGTON L.J. referred to r. 30 of the Divorce Rules.

LORD STERNDALE M.R. The practice as to obtaining particulars and striking out pleadings is stated in Rayden on Divorce, paras. 44–48 at pp. 118, 119.]

In *Ward* v. *Ward* (2) it was held that an answer to a petition for restitution of conjugal rights, denying that the respondent withdrew from cohabitation without just cause, should state

(1) [1918] 1 Ch. 133, 140.
(2) (1861) 32 L. J. (P. & M.) 120.

the cause of such withdrawal; that if it does not, it is bad on demurrer; but that the objection is waived by filing a replication. That case, it is submitted, is an unsatisfactory authority and should not be followed. The respondent does not wish to be forced to make counter-allegations against the petitioner.

Patrick Hastings K.C. and *J. H. Watts* for the petitioner were not called upon.

Lord Sterndale M.R. This is an appeal from the learned President of the Probate and Divorce Division, and I confess that when the case was first opened, I could not see how the order that he had made could be supported. But when I look at the answer, I do not think it is an ordinary traverse, such as would not involve a positive allegation. The claim of the petitioner is for restitution of conjugal rights, and her petition alleges that the respondent did "withdraw from cohabitation with your petitioner, and has kept and continued away from her without any just cause whatsoever." The respondent by his answer denies that he withdrew or remained away "without just cause." That seems to me to involve the affirmative allegation that he had some just cause for doing so, and if that be so, it is not a mere traverse of the petition. In my opinion the learned President had a discretion to order the respondent to give particulars of the cause for which he withdrew from cohabitation with his wife, and, that being so, I do not see my way to interfere with the exercise by him of that discretion. The appeal must be dismissed with costs.

Warrington L.J. I agree. The allegation in the petition is twofold: that the respondent withdrew, and that he refused to return. The answer is also twofold, but there is this remarkable feature that the respondent denies that he has without any just cause withdrawn from cohabitation, and in denying his refusal to render the petitioner conjugal rights he inserts the words "without reasonable cause" which are not in the petition. That involves, as it seems to me,

C. A. 1920

MACLULICH v. MACLULICH.

Warrington L.J.

the affirmative allegation that he had just cause for withdrawing, and reasonable cause for his refusal to render conjugal rights.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *John B. & F. Purchase.*
Solicitors for respondent: *Adams & Adams.*

W. I. C.

1920

June 21, 22.

[ADMIRALTY.]

THE MORGANA.

[1920, fol. 347.]

Admiralty—Salvage—Services rendered by Ship belonging to His Majesty—Cable-laying Ship—Ship "specially equipped with salvage plant"—Merchant Shipping (Salvage) Act, 1916 (6 *& 7 Geo.* 5, *c.* 41), *s.* 1.

Under the Merchant Shipping (Salvage) Act, 1916, "where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services. . . . ."

A cable ship belonging to the Admiralty and in the employ of the Post Office rendered salvage services to a vessel which had lost her propeller and required towage assistance. The cable ship was fitted with grappling ropes and other salvage gear, and was specially constructed for laying and repairing submarine telegraph cables:—

Held, that even assuming the equipment constituted "salvage plant," the vessel was not "specially equipped with salvage plant," which meant plant of a kind that a vessel would not be equipped with except for the purpose of rendering salvage services; and that therefore the Admiralty were not entitled to claim salvage remuneration in respect of the services of the vessel.

CONSOLIDATED actions of salvage.

The plaintiffs were the owners, masters and crews of the steam trawlers *Lacerta*, *Uvularia* and *Sea Monarch*; the owners, master and crew of the salvage steamer *Telima*; and the Lords Commissioners of the Admiralty, as owners,

1920

THE MORGANA.

and the officers and crew, of the Admiralty cable steamer *Monarch*.

The defendants were the owners of the steamship *Morgana*, a vessel of 2943 tons gross, 320 feet long, and of the value of 110,000*l*.

On March 13, 1920, when the *Morgana* was about halfway across the North Sea in the course of a voyage from Drammen to the Tyne, in ballast, she lost her propeller and sent out wireless calls for assistance.

The services of the various salvors consisted in preventing the *Morgana* from drifting ashore and towing her into Grimsby, which was reached on the evening of March 16.

The case is reported on the claim of the Lords Commissioners of the Admiralty to salvage remuneration in respect of the services of the *Monarch*. The details of these services sufficiently appear in the judgment. The writ in respect of the services of the *Monarch* was originally issued on behalf of the officers and crew only, but by an amendment made on June 10, 1920, a claim by the Lords Commissioners of the Admiralty was added. The defence was not amended in time for the trial, but it was intimated that the right of the Admiralty to sue in respect of the services of the *Monarch* as an instrument of salvage would be put in issue on the ground that she was not a ship belonging to His Majesty "specially equipped with salvage plant" within the meaning of the Merchant Shipping (Salvage) Act, 1916.

Bateson K.C. and *Alfred Bucknill* for the owners, master and crew of the *Lacerta*.

Bateson K.C. and *A. E. Nelson* for the owners, master and crew of the *Uvularia*.

Dumas for the owners, master and crew of the *Telima*.

G. P. Langton for the owners, master and crew of the *Sea Monarch*.

Butler Aspinall K.C. and *Balloch* for the Lords Commissioners of the Admiralty and the officers and crew of the *Monarch*.

Stephens K.C. and *Stranger* for the defendants.

1920

THE MORGANA.

HILL J., after stating the services of the trawlers and the salvage steamer *Telima*, continued as follows: I now come to the claim of the *Monarch*. The *Monarch* was a cable ship, and in response to a wireless message she proceeded to the *Morgana*, reaching that vessel on the afternoon of March 15. The *Monarch* was then unable to make fast because the weather was bad. She subsequently made fast and assisted the *Lacerta* in towing off from the land for some hours, and then she stood by until the following morning when the *Sea Monarch* came up. She then left to see about her own work. I do not think the true view is that she saved the *Morgana* from immediate risk of going on to the rocks. There was nothing critical at that time, but she certainly assisted the *Lacerta* in getting the *Morgana* further away from the coast.

Then arises a question, and not an easy question, with reference to the claim of the Lords Commissioners of the Admiralty. The *Monarch* belongs to the Admiralty, and is in fact in the employment of the Post Office. She is described in this way: "She is fitted with a wireless installation, a powerful searchlight, grappling ropes and other salvage gear, and was specially constructed for laying and repairing submarine telegraph cables."

Apart from the Merchant Shipping (Salvage) Act, 1916, no claim could be made for her as an instrument of salvage, because she would come within s. 557 of the Merchant Shipping Act, 1894, which provides that where any salvage services are rendered by any ship belonging to Her Majesty no claim shall be allowed, with the proviso that the master and crew can claim with the consent of the Admiralty. In the present case the officers and crew have obtained the consent of the Admiralty. But in 1916 the Merchant Shipping (Salvage) Act was passed, and it is in these terms: "Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant or is a tug, the Admiralty shall, notwithstanding anything contained in Section 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty

for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty."

The *Monarch* was not a tug. Was she "a ship specially equipped with salvage plant"? A list of her equipment has been put in, and it is said not that the plant was put on board her for the purpose of rendering salvage services, but that it was specially put on board her and was the sort of plant which was very useful in salvage services. There can be no dispute that a good deal of the equipment must be useful in rendering salvage, but in my view it is no more true to say that it is specially useful in rendering salvage services than are powerful hawsers, or powerful engines. But, assuming that the various articles described in this case come within the words "salvage plant," I still have to find, before the *Monarch* can be brought within the Act of 1916, that she is a ship "specially equipped" with such salvage plant.

What do the words "specially equipped with salvage plant" mean? It seems to me that they must mean equipped with salvage plant of a kind with which or in a way in which such a ship would not be equipped except for the purpose of rendering salvage assistance if it became necessary. The whole of the plant on board the *Monarch* was there, not for the purpose of rendering salvage services, but because it was essential for the ordinary working of the ship as a cable ship, and it was specially for that purpose. She was not "specially equipped" for salvage; she was equipped with all that was necessary for carrying on her own work. Some of that equipment was useful for salvage, but I do not think that that brings the *Monarch* within the Act of 1916.

I have never been able to understand why any particular ships should be excepted from the general rule—or why if the Admiralty can make claims in respect of salvage services by tugs they should not be entitled to claim in respect of salvage services by men-of-war. They are all ships maintained at the public expense, and if it is fair to claim in respect of one it is only fair to claim in respect of the other. But as I cannot see any real principle underlying the Act of 1916

1920

THE MORGANA.

Hill J.

I have to give effect to what appears to me to be the meaning of the exact words. I doubt very much whether the equipment was "salvage plant," and I am satisfied that the *Monarch* was not "specially equipped with salvage plant." Therefore I find that she does not come within the Act of 1916. Accordingly I can only reward the commander and crew of the *Monarch*, and it is on that basis that I make my award in her case.

The sums I allot are as follows: To the owners, master and crew of the *Lacerta*, 2100*l.*; to the *Uvularia*, 900*l.* (owners 650*l.*, master 75*l.* and crew 175*l.*); to the owners, master and crew of the *Sea Monarch*, 550*l.*; to the *Telima*, 300*l.* (owners 200*l.*, master 50*l.*, and crew 50*l.*); and to the commander of the *Monarch*, 75*l.* and to the crew 225*l.* That makes a total award of 4150*l.*

I should add, in case the matter goes further, that but for my view as to the claim of the Admiralty being barred, I should have awarded 600*l.* in respect of the *Monarch* as a salving instrument.

Solicitors for the *Lacerta* and *Uvularia*: *Pritchard & Sons, for H. T. Kearsey, Grimsby.*

Solicitors for the *Telima* and the *Sea Monarch*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for the Admiralty: *Godfrey Warr & Co., for the Treasury Solicitor.*

Solicitors for the officers and crew of the *Monarch*: *Godfrey Warr & Co.*

Solicitors for the defendants: *Botterell & Roche, for Hearfield & Lambert, Hull.*

E. C. T.

[ADMIRALTY.]

1920

July 12, 26.

THE VOLTURNO.

[1918, fol. 78.]

Admiralty—Collision—Damages—Foreign Currency—Rate of Exchange—Date of Conversion.

Where, in an action of damage by collision, the damages are assessed in a foreign currency, they must be converted into English currency at the rate of exchange ruling at the date with reference to which the damages have to be assessed. Thus, in the case of the loss suffered by the detention of a vessel during repairs, the damages must be assessed with reference to the actual period of detention, and, if proved in a foreign currency, must be converted into English currency at the rate of exchange ruling at that time.

MOTION in objection to the Registrar's report in an action of damage by collision.

The plaintiffs were the owners of the British steamship *Celia*; the defendants were the owners of the Italian steamship *Volturno*. The collision occurred on December 17, 1917. Both vessels were held to blame, and the damages were referred to the Registrar for assessment. The cross claims for damages were subsequently agreed and no reference was held; but a difference arose as to the date at which the rate of exchange allowed to the owners of the *Volturno* for loss by detention should be taken and that point was submitted to the Registrar. The Registrar reported that in his opinion the time at which the rate of exchange should be calculated was "the date of payment." At that time (June, 1920) the rate of exchange was over 66 lire to the pound sterling. At the dates when the two periods of detention for temporary and permanent repairs were incurred the rate of exchange was only 39.9 and 41.3 lire respectively. The defendants appealed.

Bateson K.C. and *Balloch* for the appellants. The Registrar should have taken the rate of exchange ruling at the date of the writ (January 24, 1918), when the rate was 40.25 lire to the pound, or at the dates when the respective periods of

1920

THE VOLTURNO.

detention were incurred. In actions for damages arising out of breach of contract the date taken has been the date when the breach occurred: see *Barry* v. *Van den Hurk* (1) and *Lebeaupin* v. *Crispin* (2); see also *Di Ferdinando* v. *Simon* (3), where Roche J. came to the same conclusion, and said that if his decision was inconsistent with his previous decision in *Kirsch & Co.* v. *Allen, Harding & Co.* (4) he preferred his later decision. The "date of payment," which presumably means the date of the report, cannot be the proper date for ascertaining the rate of exchange, as the sum received would depend upon the law's delay—the state of the list and whether there was an appeal from the judgment—and on similar matters which ought not to affect the question of the amount to which a litigant is entitled.

Langton for the respondents. The owners of the *Volturno* are entitled to restitutio in integrum. They are Italians and have lost lire and not pounds sterling. The fact that the rate of exchange is up or down is immaterial. The loss in lire has to be translated into English currency, and the owners of the *Volturno* were entitled when they got judgment for an ascertained amount—i.e., at the date of the report—to receive that sum in pounds sterling which would produce the number of lire actually lost: see *Scott* v. *Bevan* (5), *Manners* v. *Pearson & Son* (6), and the American decision in *Marburg* v. *Marburg*. (7) In an action of tort the damages are not ascertained until they have been assessed. The cases cited by the appellants were concerned with breaches of contract and are distinguishable. Further, the contract in *Di Ferdinando* v. *Simon* (3) was an English contract and therefore a pound sterling contract.

Balloch replied.

Cur. adv. vult.

(1) [1920] 2 K. B. 709.
(2) Ibid. 714.
(3) Ibid. 704. Affirmed by C. A. between the date of the arguments and the judgment. [1920] 3 K. B, 409.
(4) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63. Afterwards reversed in the Court of Appeal on a question of fact only: [1920] W. N. 73; 25 Com. Cas. 174.
(5) (1831) 2 B. & Ad. 78.
(6) [1898] 1 Ch. 581.
(7) (1866) 26 Maryland, 8.

1920

THE VOLTURNO.

July 26. HILL J. read the following judgment: On this motion in objection to the Registrar's report, the only question for decision is as to the rate of exchange at which a loss by detention suffered by the owners of the *Volturno* is to be converted from Italian into English currency.

The collision happened on December 17, 1917, between the *Celia* and the *Volturno*. Both ships were damaged. Temporary repairs to the *Volturno* were made at Gibraltar. Permanent repairs were made at Newport News. The temporary repairs caused a detention of the ship from December 25 to December 30, 1917. The permanent repairs caused a detention of the ship from January 24 to February 18, 1918. The *Volturno* was an Italian ship, and was under requisition to the Italian Government under a charterparty by the terms of which she was off hire during each period of repair. By the terms of this charterparty hire was payable by fortnightly payments. The hire was payable in Italian lire. The loss to the owners of the *Volturno* by reason of her so coming off hire was in respect of the period December 25 to 30, 1917, 47,372.32 lire, and in respect of the period January 24 to February 18, 1918, 257,046.40 lire. The damage action was begun by the owners of the *Celia* by writ dated January 24, 1918. In that action the owners of the *Volturno* counterclaimed. By judgment given on July 22, 1919, both ships were pronounced to blame. The owners of the *Volturno* filed their claim in the reference on November 19, 1919. In it they claimed as damages for loss of use of the *Volturno* the two amounts of lire above mentioned, converting into pounds sterling the 47,372.32 lire at 39.90, and the 257,046.40 lire at 41.30. These were respectively the rates of exchange ruling on the last day of the respective periods of detention.

By an agreed statement of facts, it was stated that the rate of exchange was as follows at subsequent dates—namely, July 22, 1919 (date of judgment), 37.55; November 19, 1919 (date of filing of claim of the *Volturno*), 50.25, and June 8, 1920, 66.25. On the last-mentioned date the claim, except as regards the rate of exchange on the two items in question,

1920

THE VOLTURNO.

Hill J.

was agreed between the parties, and the only question submitted to the Registrar was as regards the rate of exchange on the two items. I observe that in the claim which had been filed the owners of the *Volturno* sought to convert the cost in dollars of the permanent repairs at Newport News at 4.77, which, presumably, was the rate at the completion of the repairs on February 18, 1918, or of payment of the repairs account on February 20, 1918. It certainly was not the rate at June 8, 1920. I am not, however, informed upon what terms the items other than the detention items were agreed. I only mention the fact because the same question as to the time at which the rate of exchange is to be taken may arise as well in regard to cost of repairs as in regard to loss by detention.

The Registrar has reported that in his opinion the date of payment is the time at which the rate of exchange should be taken. He says: "In the case of the *Bellagio* I decided, on the authority of Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (1) that the rate of exchange should be taken at the date of payment." The expression "date of payment" is not very clear. In an ordinary reference tried out before the Registrar, the Registrar must finally express in English currency the amount of damages which he finds to have been suffered. He cannot award an amount expressed in a foreign currency, for a judgment cannot be entered in foreign currency; it can only be entered in English currency. But I will assume that what is meant is that damages having been assessed in a foreign currency they must be expressed in English currency at the rate of exchange ruling at the time when they are assessed; that is, at the date of the report. This is in accordance with the decision in *Kirsch & Co.* v. *Allen, Harding & Co.* (1), where, in assessing damages for breach of contract, damages expressed in American dollars were converted into English currency at the rate ruling at the date of the judgment.

The controversy before me has been whether the rate should be taken at the date at which the tribunal assesses

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.

the damages, or whether it should be taken at some other date. Mr. Bateson, for the owners of the *Volturno*, contended that the rate should be taken as at the date of the writ, or as at the respective dates when the loss by detention was suffered. Mr. Langton, for the owners of the *Celia*, contended that the Registrar was right. His strong argument was that the owners of the *Volturno* suffered their loss in lire, and that they would be fully compensated by receiving such an amount in English currency as would at the day they received it purchase the same amount of lire, and that the judgment should therefore be for as many pounds sterling as at the date of judgment would provide that amount of lire.

In addition to *Kirsch & Co.* v. *Allen, Harding & Co.* (1), I was referred to the later decision of Roche J. in *Di Ferdinando* v. *Simon* (2) and to the decisions of Bailhache J. in *Barry* v. *Van den Hurk* (3) and of McCardie J. in *Lebeaupin* v. *Crispin.* (4) Since the hearing of this motion, *Di Ferdinando* v. *Simon* (2) has been confirmed in the Court of Appeal.

These decisions make it clear that Mr. Langton's strong argument and the opinion of the Registrar are unsound. In *Di Ferdinando* v. *Simon* (2) the action was for damages for breach of contract to carry goods from London to Italy and for conversion. Roche J. found the breach and the conversion, and held that the proper measure of damages was the value of the goods at the date when they should have arrived in Italy, which he fixed as February 10, 1919, and he found the value in Italian lire. He converted the sum of lire so found into English currency at the rate of exchange ruling at the same date, and gave judgment accordingly. On the appeal the contention of the defendants was Mr. Langton's contention in the present case. It did not prevail. Bankes L.J. said that the plaintiff was entitled to have his damages assessed as at the date of the breach, and that in order to express the damages in English money the

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.
(2) [1920] 2 K. B. 704; on appeal [1920] 3 K. B. 409.
(3) [1920] 2 K. B. 709.
(4) [1920] 2 K. B. 714.

1920

THE VOLTURNO.

Hill J.

rate of exchange must be taken as it was at the date of the breach. It is to be observed that in *Di Ferdinando* v. *Simon* (1), whether regarded as a case of breach of contract or of conversion, the damages were ascertainable by ascertaining the market value of the goods at the date at which they should have arrived.

The other cases mentioned were cases of contracts of sale at a price expressed in dollars, and of claims either by seller or buyer for failure to take or give delivery, in which the damages were ascertainable by ascertaining the difference between the contract price and the market price in dollars. In *Lebeaupin* v. *Crispin* (2) the damages appear to have been ascertained by taking the difference between the contract price and the market price at the date of breach. McCardie J. is careful to point out that he is dealing only with ordinary damages for breach of contract. In *Barry* v. *Van den Hurk* (3) the date of breach is stated to be March and the sellers sold against the buyer in June, 1918; the damages in dollars were ascertained by ascertaining the difference between the contract price and the price so realized in June, and were converted into English currency at the rate ruling at that date. I conclude that either the rate was the same in June as in March, or that it was admitted or held that the sellers acted reasonably in not selling till June.

No question of consequential damage suffered at a date subsequent to the breach was involved in any of these cases. But the principles involved seem to me to apply to consequential damages in contract, and to damages in an action for negligence. These principles are: (1.) an English judgment for damages must be for a sum of English money; (2.) where the damages are assessed in a foreign currency, they must be converted into English money at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed, and not at the rate of exchange ruling at the date when the tribunal is called upon to convert into English money the damages

(1) [1920] 2 K.B. 704; on appeal [1920] 3 K.B. 409.

(2) [1920] 2 K.B. 714.

(3) [1920] 2 K.B. 709.

so ascertained. Find the date with reference to which the damages have to be assessed, and that is also the date at which the exchange must be taken for the purpose of conversion.

I apply this to an action of negligence causing collision and damage to a ship, and consequential loss of use of a ship during repairs. The damages must be assessed with reference to the actual period of detention. It is at that time that the owner suffers damage by loss of use. If those damages are proved in a foreign currency, the tribunal must convert them into English money at the rate of exchange ruling at that time. Strictly, it may be that inasmuch as the loss by detention is suffered day by day, the damages for such loss should be converted at the average rate over the period of detention, or it may be that in the present case, the hire being payable fortnightly, the loss was suffered when the fortnightly payment succeeding the detention became due and was subject to the deduction in respect of the time when the ship was off hire. I need not determine these niceties in the present case. If the rates are to be taken as at the time of the detention, it has not been suggested that the rates should be taken as other than 39.90 in respect of the period of temporary repairs, and 41.30 in respect of the period of permanent repairs. I should add that a rate of exchange is mentioned applicable to a date November, 1918, at which the Italian Government notified that the ship had been off hire during the periods of repair. The ship came off hire by virtue of the charterparty, and it is immaterial when, in settling accounts between the owners and the charterers, the amount was actually debited in account.

What I have said above of course applies only when at the time the reference is held the repairs have been done and the detention already incurred. If the claim is for prospective damages, no question of exchange arises, or, if it arises at all, it is a matter of estimate and probabilities, like everything else in such a claim.

The result is that I allow the appeal. The matter need not go back to the Registrar. The two items will be converted

1920

THE VOLTURNO.

Hill J.

into English currency, the first at the rate of 39.90 and the second at the rate of 41.30. I give the appellants the cost of the appeal. (1)

Solicitors for the appellants : *William A. Crump & Son.*
Solicitors for the respondents : *Thomas Cooper & Co.*

E. C. T.

1920

July 27, 28.

[ADMIRALTY.]

THE TRANMERE.

[1920. No. 1124.]

Admiralty—Collision—Navigation in Fog—Ferry Traffic in the Mersey—Special Fog Signals for Ferry Steamers—Practice—Regulations for Preventing Collisions at Sea, art. 15 (*a*).

In a dense fog one of the Mersey ferry steamers crossing from Woodside to Liverpool came into collision with a tug towing a number of flats up the river. There was a 3 knot flood tide, and to overcome it and make her way across and down the river the ferry steamer was making about 4 knots. Instead of sounding the signal of one prolonged blast as prescribed by art. 15 (*a*) of the Sea Regulations, she was sounding a fog signal of two moderately long blasts, and the evidence established that it was the practice of the ferry steamers to sound special signals according to the particular ferry course they were on, and that this practice was well known on the river.

The tug was held to blame for proceeding up on the wrong side of the river, and it was contended that the ferry steamer was also to blame (inter alia) for not sounding her whistle in accordance with the Sea Regulations, for excessive speed, and for being under way at all.

Held, (*a*) that although on the facts it did not contribute to the collision the sounding of the two long blasts was a breach of the Sea Regulations; (*b*) that the ferry steamer must be held to blame for excessive speed; but (*c*) that although in the circumstances it may have been improper for her to be under way, inasmuch as to counteract

---

(1) NOTE.—In October, 1920, the owners of the *Celia* appealed to the Court of Appeal.

THE COURT (Lord Sterndale M.R., Atkin and Younger L.JJ.), without calling on counsel for the owners of the *Volturno* and without giving reasoned judgments, dismissed the appeal with costs on the ground that the case was covered by the decision of the Court of Appeal in *Di Ferdinando* v. *Simon & Co.* [1920] 3 K. B. 409.

the tide she had to go at a speed which was excessive, the Court was not prepared to lay down any rule of law that ferry steamers should cease running in a dense fog.

The Lancashire (1874) L. R. 4 A. & E. 198 considered.

1920

THE TRANMERE.

ACTION of damage by collision.

The plaintiffs were the owners of the steamtug *Dagmar*; the defendants and counterclaimants were the owners of the steam ferry boat *Tranmere*.

The collision took place on the morning of May 15, 1920, in the Mersey about abreast of the southern end of the George's stage. The tide was flood with the force of at least 3 knots and there was a dense fog. The *Dagmar* was proceeding up the river bound for Runcorn with seven flats in tow made fast two abreast with the seventh flat astern. The *Tranmere*, one of the luggage ferry boats, was crossing from the Woodside luggage berth to the luggage berth at Liverpool.

According to the statement of claim, the *Dagmar* was in about mid-channel and with engines at slow ahead was making about 2 knots. Her whistle was being duly sounded for fog. Her engines, which had been stopped on hearing the whistle of one of the ferry steamers, had been put slow ahead again when a long blast from the whistle of a vessel which proved to be the *Tranmere* was heard on the starboard bow. The engines of the *Dagmar* were again stopped, and when the *Tranmere* shortly afterwards came into sight close to and about ahead the engines of the *Dagmar* were put full speed astern and three short blasts were sounded, but the *Tranmere* which was travelling at high speed came on and struck the *Dagmar*.

The plaintiffs alleged (inter alia) that the *Tranmere* failed to sound her whistle for fog in accordance with the Regulations; failed to go at a moderate speed; and having regard to the state of the weather that it was negligent for her to cross the river.

According to the defence the *Tranmere* was heading about North with engines going easy and duly sounding her whistle for fog [two long blasts] when a long blast was heard from one of the Woodside ferry boats about to leave the

1920

THE TRANMERE.

Liverpool stage. The *Tranmere* blew two blasts in reply and stopped her engines. The two ferry boats repeated their signals to each other and the *Tranmere*, which was by then making no headway, resumed sounding her fog signals. Almost immediately afterwards the *Dagmar* came into sight close to and slightly on the port bow. The engines of the *Tranmere* were rung astern, but before they could have any effect the *Dagmar* came on at excessive speed and the collision happened.

The defendants alleged (inter alia) that those on the *Dagmar* were negligent in failing to go at a moderate speed; in failing to sound the whistle for fog in accordance with the Regulations; and in failing to keep to that side of the fairway which lay on her starboard side.

A. T. Miller K.C. and *Dumas* for the plaintiffs.
Laing K.C. and *R. E. Gething* for the defendants.

HILL J. [after stating the respective cases set out above continued as follows:] I am unable to accept in full the evidence on either side. In some respects I think neither side was giving the Court true evidence, but there is sufficient for me to arrive at the conclusion that both vessels are to blame. I find that the place of collision was well to the East of mid-river, and therefore the *Dagmar* was on her wrong side. I deal next with the signals that were being given for fog. Was either ship sounding at all? Each says she did not hear the other and she asks the Court to infer that the other ship was not sounding. Each, on the other hand, says she was sounding a signal the nature of which I will deal with later. What is the truth of this matter? Is it that neither ship was sounding a fog signal and that is the explanation of the other ship not hearing it; or is the truth that each was sounding a fog signal and the other ship did hear it but comes to the Court to say that she did not hear it in order to excuse her for not having acted for it? I am in doubt as to a good deal of the evidence on both sides, but I find that both vessels were sounding fog signals, and I

1920

THE TRANMERE.

Hill J.

am very doubtful whether either side is speaking the truth when it says it did not hear the fog signal of the other.

I will now deal with the nature of the fog signal. The *Dagmar* had a long trail of flats in tow. The total length of the flotilla was about 500 feet. The *Dagmar* was going up the river sounding a single long blast instead of the signal prescribed by art. 15 (*a*) of the Sea Regulations—one long blast followed by two short blasts. The master of the tug confessed that when towing craft in fog he always sounded the single long blast and not the prescribed signal. If that be so he persistently broke the Regulations. It is of very great importance that a vessel towing another or others should sound the proper signal. The indication that the *Dagmar* gave to other ships was that she was a single steamship all by herself coming up the river, whereas she was a tug with a long line of flats 500 feet in length. It is said that it made no difference, as it was not a matter which caused or contributed to the collision. If I am right in disbelieving the *Tranmere's* evidence that she heard nothing at all, perhaps it is immaterial; she heard the single long blast and the collision was not brought about by the length of the tow. On the other hand if I am wrong in disbelieving her and the fact be that she did not really hear anything, then it may well be that a towing fog signal, one long and two short, might have arrested the attention of people who were careless to a single long blast. It shows the importance of obeying the Regulation. As to the *Dagmar* therefore I find that she was sounding a signal which might have conduced to the collision.

As to the *Tranmere* she also was sounding a signal which was not in accordance with the Regulations. She was sounding two blasts of moderate length, something between a long blast and a short blast, instead of one long blast. It has long been the practice of the ferry boats on the Mersey to sound special signals according to the particular ferry course they happen to be on, and this practice is well known on the Mersey. The evidence of all the witnesses, except the master of the *Dagmar* who professed to be ignorant of it, was that the

1920

THE TRANMERE.

Hill J.

practice is well known. I have no doubt that it was as well known to the master of the *Dagmar* as it was to everyone else. But this departure from art. 15 (*a*) is not justified under the Sea Regulations nor under any special rule which has been made for the Mersey. It is a breach of the Regulation, but in this particular case it is impossible to say that it contributed to the collision; for if, as I find, two fairly prolonged blasts were being sounded instead of one long blast, they certainly gave as good a warning as the one would give. If the two were not heard at all, then one would not be heard. If two were heard they gave quite as much, or rather more information, to the *Dagmar* than if only one had been blown.

There remain two questions, the answers to which I think depend upon very similar considerations. It is argued that the *Tranmere* contributed to the collision by excessive speed, and it is also argued that she ought not to have been under way at all. I will deal first with her speed immediately before and at the time of the collision. I find against the *Tranmere* upon the question of speed; I find it was not less than 4 knots and I think it was probably rather more. [His Lordship dealt with the evidence on this point and said, that he found that the *Dagmar* had only very slight way and continued:] In the circumstances the *Tranmere's* speed was excessive, because the circumstances were such that the two ships only became visible to each other at a distance of 30 feet—i.e., at so short a distance that it was impossible for the *Tranmere* to do anything to avoid the collision. It is contended that that speed was not wrong for the ferry boat which had already reached the East side of the river, because she had no reason to anticipate that the *Dagmar* would be improperly coming up the river in her wrong water, and that there was nothing to inform the *Tranmere* that the *Dagmar* was so coming up. That brings one back again to the question of the whistle signals, and as I have found that the *Dagmar* in fact was sounding a long blast—although not the right sort of blast—it was a signal which informed the *Tranmere* that there was a ship coming up on

the wrong side of the river. Therefore a speed which would not have been justifiable further out in the river or in crossing the river was not justifiable when the *Tranmere* was approaching her berth. This leads me to the conclusion that the *Tranmere* is to blame for excessive speed contributing to the collision; and in my view, having discussed the matter with the Elder Brethren, it brings me to the same point as the question whether she ought to have been under way at all. Mr. Miller invited me to find in law that in a dense fog the ferry boat was not entitled to be under way, and that it was negligence to be under way at all, and he referred me to *The Lancashire.* (1) Now *The Lancashire* (1) was decided in 1874, and the importance of the ferry traffic to Liverpool, Birkenhead and the whole industry of the Mersey, of course has altered very much since that time. Speaking for myself, I should not be prepared to lay down any rule of law as to the duty of these ferry boats to cease running under any circumstances; and I do not think, if *The Lancashire* (1) is looked at fairly, it is a decision in law that the ferry boats are negligent merely because they are running in dense fog or that they run in dense fog at their own risk. It was not necessary in *The Lancashire* (1) to lay down any such law. The *Lancashire*, the ferry boat, was under way, and was in collision with a ship which was at anchor and found to be ringing her bell. The *Lancashire*, therefore, was to blame without anything more being said about it. Moreover I think the judgment of Sir Robert Phillimore, in dealing with the duty of a ferry boat not to be under way in the circumstances, was a decision given with reference to the circumstances of the case which he sets out. From that view I express no dissent; there may be circumstances, owing to fog and other things, which make it impossible for a ferry boat to be under way and at the same time navigate with such care as is required in fog; and in this particular case I think it is probable that at the time in question it was impossible for the ferry boat to make her passage from Woodside to Liverpool except

(1) L. R. 4 A. & E. 198.

1920

THE TRANMERE.

Hill J.

at a speed which in the dense fog was excessive. There was a 3 knot tide which she had to overcome and at the same time get down the river on her way to Liverpool. She could not do it unless she was making at least four knots, which in so dense a fog was an excessive speed. Therefore, in this case it may well be that it was improper for the ferry boat to be under way at this particular time; but the fault which she committed as against the *Dagmar* was excessive speed and it is for that I condemn her.

The result is that I pronounce both ships to blame and I see no reason to draw any distinction in the degrees of fault.

Solicitors for the plaintiffs: *Hill, Dickinson & Co., Liverpool.*

Solicitors for the defendants: *F. Venn & Co., for James Fearnley, Birkenhead.*

E. C. T.

1920

July 29.

[ADMIRALTY.]

THE MARIE GARTZ (No. 2).

[1912, fol. 388.]

Admiralty—Collision—Enemy-owned Vessel—Treaty of Versailles, 1919, *arts.* 296 *and* 297—*Treaty of Peace Order*, 1919, *para.* 1, *sub-ss.* 16, 17—*Charging Order—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

A collision took place in 1912 between the British steamship *K.* and the German steamship *M. G.* The *K.* was held alone to blame, and the damages were referred to the Registrar for assessment. Before the damages had been assessed war broke out and the reference was not held until after the conclusion of peace. During the war the owners of the *K.* lost a vessel by German submarine attack, and claimed that under annex 14 to art. 296 of the Treaty of Versailles they had a right to set off that loss against the damages they had to pay to the owners of the *M. G.*, and that the right of set-off was superior to the right of the solicitors acting for the owners of the *M. G.*, who claimed a charging order on the damages for their costs.

Under art. 297 (*h*) provision is made (inter alia) for "the net proceeds of sales of enemy property, rights or interests . . . . and in general

all cash assets of enemies" to be dealt with through clearing offices:—

Held, that "assets" meant net assets: i.e., subject to the deduction of the cost of collection and realization; that assuming (without deciding) that annex 14 gave the owners of the *K.* a right of set-off, they would only be entitled to that set-off as against the net assets which would otherwise have to be credited to the Creditor Clearing Office; and that the solicitors for the owners of the *M. G.* were entitled to a charging order upon the damages for their costs, the costs to be taxed as between solicitor and client.

SUMMONS adjourned into Court for judgment.

The summons was taken out by the solicitors for the German owners of the steamship *Marie Gartz*, Messrs. Stokes and Stokes, who asked for a charging order for their costs under s. 28 of the Solicitors Act, 1860, upon the damages which were payable by the owners of the British steamship *Karamea* in respect of a collision which took place between the two vessels in 1912. During the war the owners of the *Karamea* lost a vessel by German submarine action and claimed that under annex 14 to art. 296 of the Treaty of Versailles (1) they had a right of set-off against the damages which otherwise would have to be credited to the Creditor Clearing House, and that this right was superior to the solicitors' rights under s. 28 of the Solicitors Act.

Stranger in support of the application.

Alfred Bucknill for the owners of the *Karamea*.

Cur. adv. vult.

HILL J. read the following judgment: In this case Mr. Graham Stokes, carrying on business as Messrs. Stokes & Stokes, applies for a charging order under s. 28 of the Solicitors Act, 1860. He is the surviving partner of the firm of Messrs. Stokes & Stokes upon the death in August, 1914, of his partner Mr. Reginald Sewell Stokes. Between

(1) Annex 14: "The Debtor Clearing Office will . . . . credit the Creditor Clearing Office with all debts admitted. . . . .

"As an exception, the admitted debts owing by persons having suffered injury from acts of war shall only be credited to the Creditor Clearing Office when the compensation due to the person concerned in respect of such injury shall have been paid."

1920

THE MARIE GARTZ (No. 2).

HILL J.

some date in 1912 and August 4, 1914, and since the conclusion of peace with Germany, Messrs. Stokes & Stokes acted as solicitors for the German owners of the *Marie Gartz* in a collision action between the English owners of the steamship *Karamea* and the owners of the *Marie Gartz*, in which there were claim and counterclaim. Before August 4, 1914, that action, which was carried on appeal to the House of Lords, ended in a decree in favour of the owners of the *Marie Gartz* and judgment against the owners of the *Karamea* for damages and costs. Since the conclusion of peace with Germany the claim of the owners of the *Marie Gartz* has been investigated by the Registrar and Merchants, and on July 5, 1920, I confirmed the report but stayed execution pending further order.

The amount payable by the owners of the *Karamea* in respect of the damages is 7391*l.* 9*s.* 10*d.*, with interest at 4 per cent. per annum from December 15, 1912, until payment. In addition there are payable the taxed costs of the owners of the *Marie Gartz* in this Court and the Court of Appeal and House of Lords. Taxation has not yet been completed. An affidavit has been filed in support of the application wherein Messrs. Stokes & Stokes' costs as between themselves and their clients, the owners of the *Marie Gartz*, are estimated to amount to approximately 2000*l.* and the out-of-pocket disbursements to approximately 1100*l.*

The present summons asks for a charging order upon the damages recovered against the owners of the *Karamea* and for an order that Messrs. Stokes & Stokes' costs be taxed as between solicitor and client, and that the owners of the *Karamea* be ordered within seven days after the date of the certificate of taxation to pay to them the amount found due on taxation, out of the amount found due to the owners of the *Marie Gartz*.

Apart from questions arising under the Treaty of Peace Order in Council, there would be no difficulty in the matter. The recovery has been by the exertions of Messrs. Stokes & Stokes, and they would be entitled to a charging order, and an order for payment to them, and the order would charge

both the damages recovered: *Birchall* v. *Pugin* (1), and the costs payable under the judgments: *Dallow* v. *Garrold.* (2) A charge upon the costs, however, is not asked for in the summons. Neither the owners of the *Karamea* nor the owners of the *Marie Gartz* dispute that such an order would in ordinary course be made.

But it is said that the order cannot be made because of some provisions of the Treaty of Peace Order in Council, and of articles in Part 10 of the Treaty of Peace. The applicant had given notice of his application to the Public Trustee as Custodian under the Treaty of Peace Order, and I had hoped for some assistance from him. He has, however, written a letter in which he says: "In view of the limited time available it has not been possible to instruct counsel to appear on behalf of the Custodian, but in pursuance of para. I. (17a) of the Treaty of Peace Order, 1919, he is prepared to consent to the sum due by the owners of the *Karamea* being dealt with in such manner as his Lordship may direct." The Public Trustee not having appeared upon the summons or upon its adjournment into Court, I must, without his assistance, construe as best I can articles and an Order in Council which are not at all easy of interpretation. The representative of the owners of the *Marie Gartz*, the judgment creditors, appeared and consented to the order being made. The owners of the *Karamea*, the judgment debtors, also appeared, and while expressing great sympathy with Messrs. Stokes & Stokes, contended that the order could not be made, because the effect of it would be to deprive them pro tanto of a right of set-off which they contend they have by virtue of art. 296, annex 14. They state that they lost a ship by German submarine attack, and contend that the concluding paragraph of annex 14 gives them a right to recoup themselves out of the moneys they owe to the owners of the *Marie Gartz*, and that that right is superior to any right of Messrs. Stokes & Stokes.

In addition to considering this contention, I have also

(1) (1875) L. R. 10 C. P. 397. (2) (1884) 14 Q. B. D. 543.

1920

THE MARIE GARTZ (No. 2).

Hill J.

to consider whether there is anything in the Treaty of Peace Order which prevents my making the order asked for. I have already on another occasion (1) held that the right of the owners of the *Marie Gartz* against the owners of the *Karamea* in respect of damages was a right within art. 297 of the Treaty and not a "debt" within art. 296. Now that the right to unliquidated damages has been converted into a liquidated sum, it has not thereby become a debt within art. 296, for the only debts to which art. 296 relates are debts payable before the war, or debts which became payable during the war: see art. 296 (1.) and (2.). Indeed, having regard to para. 2 of the annex to art. 296, it may be doubted whether the annex relates to any debts, except debts payable before the war. Be that as it may, the judgment debt for 7391*l.* 10*s.* and interest owing by the owners of the *Karamea* to the owners of the *Marie Gartz* did not come into existence, and did not become payable as a debt till the confirmation of the Registrar's report on July 5, 1920. Art. 296 has no direct application to the judgment debt of 7391*l.* 10*s.* and interest. Art. 297 continues to apply to it as it applied to the right for unliquidated damages. In art. 297 I can see nothing which prevents me making the order asked for. On the contrary, art. 297 (*b*) provides that the liquidation shall be carried out in accordance with the laws of the Allied State concerned, and that the German owner shall not be able to dispose of such property, rights or interests, nor to subject them to any charge, without the consent of that State. This shows that the consent of the owners of the *Marie Gartz* is of no effect. But it provides that the liquidation of the right of the owners shall, in this case, be carried out in accordance with the laws of England. It is in accordance with the laws of England to see that a solicitor who recovers property for a client shall be protected in the way provided by s. 28, and the solicitor's costs of recovery are expenses of liquidation. Art. 297 (*h*) provides how the property, rights and interests of the owners of the *Marie Gartz*, when liquidated, are to

(1) Ante, p. 172.

be dealt with. It speaks of "the net proceeds of sales," and "in general all cash assets." I observe that both in (*b*) and in (*h*) the same word "liquidation" is used in the French text, while in the English text "liquidation" is used in (*b*) and "sales" in (*h*).

But if I have to regard only the English text, which is set out in the Order in Council, I read "assets" as meaning net assets, that is, the assets after deducting the expenses of collection or realization. I therefore hold that there is nothing in art. 297 (*h*) which prevents me making the order asked for. This also disposes of the point made by the owners of the *Karamea* as to set-off. Assuming that the last paragraph of art. 296, annex 14, applies at all to assets realized under art. 297, as to which I say nothing, the owners of the *Karamea* can only get the benefit of the set-off as against debts which would otherwise have to be credited to the Creditor Clearing Office. And in my view the effect of art. 297 (*h*) is that it is only the net assets, or net proceeds of liquidation, which have to be credited through the Clearing Office.

I still have to consider whether there is anything in the Treaty of Peace Order apart from the incorporated articles of the Treaty which prevents me making the order. (1) The charge created by para. 1, sub-s. 16, is a charge upon the net proceeds. Sub-s. 17 (*e*) provides that "If any person called upon to pay any money or to transfer or otherwise to deal with any property rights or interests . . . . has reason to suspect that the same are subject to such charge . . . . he shall before paying in . . . . report the matter to the Custodian and shall comply with any directions that the Custodian may give with respect thereto." The owners of the *Karamea* have reported to the Custodian and so have Messrs. Stokes & Stokes. The Custodian has given no directions. I understand that he leaves it to the Court. I need not, in those

(1) Sub-ss. 1 and 2 of para. 1 of the Treaty of Peace Order provide for the establishment in the United Kingdom of a clearing office, and make it unlawful for any person to pay or accept payment of any enemy debt otherwise than through the clearing office.

1920

THE MARIE GARTZ (No. 2).

Hill J.

circumstances, decide whether I could override express directions of the Custodian, and I see no reason why I should not order payment to Messrs. Stokes & Stokes.

In my judgment there is nothing which prevents me making a solicitors' charging order in the usual way, ordering payment to the solicitors by the judgment debtors. I make a charging order as prayed. I direct Messrs. Stokes & Stokes' costs to be taxed as between solicitor and client. I order payment in seven days thereafter, including their costs of this application.

Solicitors for the owners of the *Marie Gartz*: *Stokes & Stokes.*

Solicitors for the owners of the *Karamea*: *Ince, Colt, Ince & Roscoe.*

E. C. T.

END OF VOLUME.

BIBL LONDIN. UNIV.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1920, will be as follows:—

In the First Series,

[1920] 1 Ch. [1920] 2 Ch.

In the Second Series,

[1920] 1 K. B. [1920] 2 K. B. [1920] 3 K. B. [1920] P.

In the Third Series,

[1920] A. C.

INDEX.

ACTIONS—Consolidated—Salvage - 111
See SHIPPING.

—— Limitation of **104, 119, 223, 228, 236**
See SHIPPING.

ADMIRALTY.
See PEACE TREATY, PRIZE COURT, and SHIPPING.

ADULTERY.
See DIVORCE.

AFFIDAVIT—Leave to give evidence by—
Divorce - - - - - 67
See DIVORCE.

—— Service - - - - - - 40
See DIVORCE.

ALLIED PORT—Neutral vessels sailing from
See PRIZE COURT. 1

ANSWER—Petition - - - - 439
See DIVORCE.

APPEARANCE—Co-respondent or respondent—Default - - - - 40
See DIVORCE.

—— Writ - - - - - - - 119
See SHIPPING.

APPOINTMENT — Guardian — Minor — Divorce - - - - - - 65
See DIVORCE.

APPRAISEMENT — Erroneous basis of valuation—Requisition - - 43
See PRIZE COURT.

ARMISTICE—Seizure after. - - 177
See PRIZE COURT.

ARREST—Vessel - - - 30, 236
See SHIPPING.

ASSESSMENT—Damages—Divorce - 17
See DIVORCE.

AUTHORITY—Master—Ship - - 22
See SHIPPING.

BAIL—Shipping—Collision - - - 78
See SHIPPING.

BARRATROUS INTENTION—Master - 413
See PRIZE COURT.

BATTLE OF JUTLAND—Prize bounty 408
See PRIZE COURT.

BIRTHS AND DEATHS REGISTRATION ACTS - - - - - - 75
See DIVORCE.

BOUNTY—Prize - - - - - 408
See PRIZE COURT.

BY-LAWS—Tyne - - - - - 187
See SHIPPING.

CANADA—Wreck Commissioner's Court
See SHIPPING. 400

CAPTURE—Prize Court - - 81, 347
See PRIZE COURT.

CARGO—Prize Court.
See PRIZE COURT.

CASES:—

—— *Gayer* v. *Gayer* [1917] P. 64.
Explained. GOODMAN *v.* GOODMAN AND PINFIELD - - - - 67

—— *Godman* v. *Godman* [1919] P. 229.
Affirmed - - - - **C. A. 261**

—— *Holman* v. *Wade* [*The Times*, May 11, 1877].
Followed. THE TURID
Div. Ct. (P. D. & A.) 370

—— *Kim, The* [1915] P. 215.
Referred to - - - - - 319

CASES—*continued.*
—— *Lancashire, The* (1874) L. R. 4 A. & E. 198.
Considered. THE TRANMERE 454
—— *Noel* v. *Noel* (1885) 10 P. D. 179.
Discussed. WILLIAMS *v.* WILLIAMS AND KILBURN - - 69
—— *Norris* v. *Norris and Smith* [1918] P. 129.
Approved and followed. BURNE *v.* BURNE AND HELVOET - - 17
—— *Parlement Belge, The* (1880) 5 P. D. 197.
Considered and applied. THE PORTO ALEXANDRE - - - C. A. 30
—— *Rayment* v. *Rayment and Stuart* [1910] P. 271.
Approved. RUSH *v.* RUSH, BAILEY AND PIMENTA - - C. A. 242
—— *Robinson* v. *Robinson and Wilson* (1898) 78 L. T. 391.
Approved and followed. BURNE *v.* BURNE AND HELVOET - - 17

CASUALTIES—Shipping—Courts of formal investigation into - - - 400
See SHIPPING.

CERTIFICATE—Master—Ship—Cancellation and suspension - - - 400
See SHIPPING.

CERTIFIED COPY—Register - - 75
See DIVORCE.

CHARGES—Formulation of—Courts of formal investigation into shipping casualties - - - - 400
See SHIPPING.

CHARGING ORDER - - 425, 460
See PRIZE COURT and SOLICITOR.

CHARTERPARTY.
See PRIZE COURT and SHIPPING.

CHURCH—Plate—Faculty for sale of - 97
See ECCLESIASTICAL LAW.

CHURCH OF ENGLAND—Marriage—British colony—Evidence - - - 361
See DIVORCE.

CITING—Co-respondent - - - 242
See DIVORCE.

CODICIL - - - - - - - 261
See PROBATE.

COLLISION—Shipping.
See PRIZE COURT and SHIPPING.

COLONY — British—Evidence — Marriage — Church of England - - 361
See DIVORCE.

COMMON EMPLOYMENT—Doctrine of 193
See SHIPPING.

COMPANY—Enemy controlled - - 385
See PRIZE COURT.

CONDEMNATION—Prize Court 200, 319, 347
See PRIZE COURT.

CONDONATION—Divorce - - - 158
See DIVORCE.

CONNUBIAL INTERCOURSE - - 158
See DIVORCE.

CONSOLIDATED ACTIONS—Salvage - 111
See SHIPPING.

CONTRABAND - - - 177, 216, 319
See PRIZE COURT.

CONTRACT—Indemnity - - - 22
See SHIPPING.

CONTRIBUTION—Right of joint tort feasors - - - - - - 193
See SHIPPING.

CO-RESPONDENT.
See DIVORCE.

COSTS—Consolidated salvage action - 111
See SHIPPING.
—— Divorce - - 17, 65, 90, 126, 206
See DIVORCE.
—— Prize Court - - - 1, 425
See PRIZE COURT.

CROWN—Damages against the - - 1
See PRIZE COURT.
—— Droits of the - - - - - 289
See NAVAL PRIZE TRIBUNAL.
—— Servants of—Action against - 104
See SHIPPING.
—— Ship belonging to—Salvage - - 442
See SHIPPING.

CUSTOM OF PORT - - - - 370
See SHIPPING.

DAMAGES—Collision - - - 447
See SHIPPING.
—— Divorce - - - 17, 90, 126
See DIVORCE.
—— Loss of life - - - - - 193
See SHIPPING.
—— Prize Court - - - 1, 56
See PRIZE COURT.
—— Shipping—Collision - - - 12
See SHIPPING.
—— Treaty of Peace—Right to litigate claim for - - - - - - 172
See PEACE TREATY.

DEATH—Petitioner—Divorce — Wife's costs
See DIVORCE. 71

DEFENCE—Statutes of limitation - 119
See SHIPPING.

DELAY—Waiting for convoy - - 12
See SHIPPING.

DEMURRAGE—Shipping - - - 12
See SHIPPING.

DESTINATION—Ship - - - 413
See PRIZE COURT.

DETENTION—Ship—Prize Court 56, 430
See PRIZE COURT.

DISCRETION—Admiralty Court 228, 236
See SHIPPING.

—— Divorce - - - 20, 69, 242
See DIVORCE.

—— Faculty for sale of church plate - 97
See ECCLESIASTICAL LAW

—— Prize Court - - - - 216
See PRIZE COURT.

DISCRETIONARY POWERS - - 119
See SHIPPING.

DISSOLUTION—Marriage.
See DIVORCE.

DIVERSION—Neutral vessels - - 1
See PRIZE COURT.

DIVORCE — *Condonation — Forgiveness — Evidence—Husband's Renewal of Connubial Intercourse with Knowledge of his Wife's Adultery — Verbal Refusal to forgive.* CRAMP *v.* CRAMP AND FREEMAN **McCardie J. 158**

2. —— *Co-respondent — Foreign — Difficulty of service — Motion to proceed without citing Co-respondent — No Damages or Costs claimed by Petition — Discretion — Respondent's Right to be heard — Practice — Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 27, 28, 33, 42. RUSH *v.* RUSH. BAILEY AND PIMENTA - - **C. A. 242**

3. —— *Costs — Co-respondent—Damages —Practice — Knowledge that Respondent is married — Circumstances Material for Assessment of Damages.* BURNE *v.* BURNE AND HELVOET - - - - - **Duke, Pres. 17**

4. —— *Costs — Damages — Husband's Claim for against Co-respondent — Measure of Damages — Grounds for awarding Costs—Value of Wife—Conduct and Means of Co-respondent—Effect of Co-respondent's Ignorance that Respondent was a Married Woman —Practice—Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 33. BUTTERWORTH *v.* BUTTERWORTH AND ENGLEFIELD. COLLINS *v.* COLLINS AND HARRISON. BARRATT *v.* BARRATT AND FOX. HOWELL *v.* HOWELL AND WALKER. ADAMS *v.* ADAMS AND WARD. ELLWORTHY *v.* ELLWORTHY AND LEDGARD - - **McCardie J. 126**

5. —— *Costs — Damages — Knowledge of Co-respondent that Respondent is a married Woman — Measure of Damages — Practice.* LANGRICK *v.* LANGRICK AND FUNNELL **Duke, Pres. 90**

6. —— *Costs — Wife's — Husband's Petition — Husband suing as Poor Person — Security for—Practice—Divorce Rule* 158. SMITH *v.* SMITH AND RUTHERFORD **Duke, Pres. 206**

7. —— *Costs — Wife's — Husband's Petition — Order for Payment into Court—Death of Husband before Order obeyed—Liability of his Executors—Jurisdiction of Divorce Court to enforce Order—Practice.* COLEMAN *v.* COLEMAN AND SIMPSON - **Duke, Pres. 71**

8. —— *Costs — Wife's—Wife's Petition dismissed—Usual Order—Limit to Amount for which Husband ordered to give Security — Practice.* BETTON-BRIGHT *v.* BETTON-BRIGHT **C. A. 338**

9. —— *Discretion of Court — Adultery of Petitioner — Principles on which Discretion will be exercised—Interests of all Persons concerned, including Children of the Marriage—Matrimonial Causes Act,* 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31. WILSON *v.* WILSON **Duke, Pres. 20**

10. —— *Evidence — Affidavit — Leave to give Evidence by — Affidavit containing Allegations of Adultery—Practice.* GOODMAN *v.* GOODMAN AND PINFIELD **McCardie J. 67**

11. —— *Evidence — Marriage — British Colony—Church of England Marriage — Ecclesiastical Certificate — Expert Evidence of Colonial Law.* PERRY *v.* PERRY **Horridge J. 361**

12. —— *Evidence—Proof of Birth of Child — Certified Copy of Register — Evidence of Handwriting of Informant in original Register—Right of Public to inspect Register—Practice—Births and Deaths Registration Acts,* 1836 (6 *&* 7 *Will.* 4, *c.* 86), *s.* 35; 1874 (37 *&* 38 *Vict. c.* 88), *s.* 44. BEST *v.* BEST AND MCKINLEY - **McCardie J. 75**

13. —— *Minor — Respondent — Appointment of Guardian—Duty of Petitioner to procure Appointment—Service on Minor—Costs —Practice.* QUINN *v.* QUINN - **Duke, Pres. 65**

14. —— *No Appearance by Co-respondent or Respondent — Affidavit of Service—Evidence of Identity of Person served—Practice.* SPENDLEY *v.* SPENDLEY AND GOARD. HOBBS *v.* HOBBS - - - - - - - **40**

15. —— *Permanent Maintenance—Variation of Settlement — Leave to present Petition out of Time—Application to Judge—Jurisdiction of Registrar—Practice — Divorce Rules,* 95, 121, 122, 181. FYFFE *v.* FYFFE **Duke, Pres. 310**

16. —— *Restitution of Conjugal Rights, Petition for — Answer — Traverse — Affirmative Allegations—Right of Petitioner to Particulars—Practice.*
Decision of Sir Henry Duke P. affirmed. MACLULICH *v.* MACLULICH - - **C. A. 439**

17. —— *Settlement — Variation—Dissolution of Marriage—Guilty Wife's settled Property—Power of Wife to appoint to Husband and Children of future Marriage — Power limited to Husband and Children of Marriage subsequent to first Husband's Death—Matrimonial Causes Act,* 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5. WILLIAMS *v.* WILLIAMS AND KILBURN **Duke, Pres. 69**

DROITS—Crown—Admiralty - - 289
See PRIZE COURT.

ECCLESIASTICAL LAW—*Faculty—Faculty for Sale of Church Plate—Jurisdiction—Discretion.* ST MARY, NORTHOLT (VICAR AND CHURCHWARDENS) *v.* PARISHIONERS. ST. GEORGE-IN-THE-EAST (RECTOR AND CHURCHWARDENS) *v.* PARISHIONERS
Consistory Court of London - 97

ENEMY—Prize Court.
See PRIZE COURT.

EVIDENCE—Divorce.
See DIVORCE.

—— Shipping—Custom inconsistent with charterparty—Exclusion - **370**
See SHIPPING.

EXECUTORS—Petitioner—Wife's costs **71**
See DIVORCE.

EXPENSES—Prize Court - **200, 209, 430**
See PRIZE COURT.

FACULTY—Ecclesiastical law - - **97**
See ECCLESIASTICAL LAW.

FERRY TRAFFIC—Mersey - - **454**
See SHIPPING.

FOG—Navigation in—Mersey - - **454**
See SHIPPING.

FOREIGN CO-RESPONDENT –Difficulty of service - - - - **242**
See DIVORCE.

FOREIGN CURRENCY—Collision—Damages —Date of conversion — Rate of exchange - - - - **447**
See SHIPPING.

FOREIGN MASTER—Ignorance of terms of the contract—Authority to bind owners - - - - - **22**
See SHIPPING.

FORGIVENESS—Adultery - - - **158**
See DIVORCE.

FREIGHT—Prize Court - - - **216**
See PRIZE COURT.

GERMAN CLAIMANTS—Right to litigate claim for damages—Treaty of Peace
See PEACE TREATY. **172**

GUARDIAN—Minor—Divorce - - **65**
See DIVORCE.

HAGUE CONVENTION - - - - **81**
See PRIZE COURT.

HUSBAND AND WIFE.
See DIVORCE.

IDENTITY—Person served—Affidavit of service - - - - - - **40**
See DIVORCE.

IGNORANCE—Co-respondent's — That respondent was a married woman
See DIVORCE. **126**

—— Terms of contract — Foreign master —Authority to bind owners - **22**
See SHIPPING.

IMMUNITY—Process of arrest—Public vessel
See SHIPPING. **30**

INDEMNITY—Contract of - - - **22**
See SHIPPING.

INFANT—Divorce - - - - - **65**
See DIVORCE.

INSTRUCTIONS —Soldier's will - - **261**
See PROBATE.

INSURANCE—Prize Court - - **209, 430**
See PRIZE COURT.

INVESTMENT—Proceeds—Sale—Prize Court
See PRIZE COURT. **200**

JOINT TORT FEASORS - - - **193**
See SHIPPING.

JUDGE—Divorce—Leave to present petition out of time—Application to - **310**
See DIVORCE.

JURISDICTION—Divorce court—Death of petitioner—Wife's costs - - **71**
See DIVORCE.

—— Faculty for sale of church plate - **97**
See ECCLESIASTICAL LAW.

—— Registrar - - - - - - **310**
See DIVORCE.

—— Res not within—Writ in rem - **223**
See SHIPPING.

"KEEP COURSE AND SPEED" - **314**
See SHIPPING.

KING'S SHIP—Commanding officer of — Action against - - - **104**
See SHIPPING.

KNOWLEDGE—Charterers and masters — Contraband - - - - **319**
See PRIZE COURT.

—— Co-respondent — That respondent is married - - - - - - **17**
See DIVORCE.

LEAVE—Petition out of time — Permanent maintenance—Divorce - - **310**
See DIVORCE.

LIABILITY—Statutory limit of—Shipping—Collision—Bail - - - **78**
See SHIPPING.

LICENCE TO TRADE—Agreement of April 30, 1918, made between U.S.A. and Norway - - - - - **177**
See PRIZE COURT.

LIFE—Damages for loss of - - - **193**
See SHIPPING.

LIMITATION—Actions - - - **236**
See SHIPPING.

—— Liability - - - - - - **228**
See SHIPPING.

—— Statutes of - **104, 119, 223, 228**
See SHIPPING.

LOSS—Enemy vessel—Captured in neutral territorial waters - - - 81
See PRIZE COURT.

LOSSES AND EXPENSES — Shipowners' claims for—Innocent cargo owners
See PRIZE COURT. 56

LUMP SUM—Tender—Separate salvors 111
See SHIPPING.

MAINTENANCE—Permanent—Divorce 310
See DIVORCE.

MARITIME CONVENTIONS ACT, 1911 104, 119, 193, 223, 228, 236
See SHIPPING.

MARRIAGE—Divorce.
See DIVORCE.

MARSHAL—Prize Court—Expenses
See PRIZE COURT. 200, 209

MASTER—Ship—Authority to bind owners
See SHIPPING. 22

—— Ship—Barratrous intention - - 413
See SHIPPING.

—— Ship—Certificate—Cancellation - 400
See PRIZE COURT.

—— Ship—Knowledge—Contraband cargo
See PRIZE COURT. 319

MASTER AND CREW—Separate representation of—Salvage actions - 111
See SHIPPING.

MATRIMONIAL CAUSES ACTS - - 20,
See DIVORCE. 69, 126, 242

MEASURE OF DAMAGES—Divorce 90, 126
See DIVORCE.

MERCHANT SHIPPING ACT, 1894 - 228
See SHIPPING.

MINOR—Respondent—Appointment of guardian - - - - - - 65
See DIVORCE.

MOTION—Divorce - - - - 242
See DIVORCE.

NAVAL PRIZE TRIBUNAL - - 289
See PRIZE COURT.

NEGLIGENCE—Prize Court - - 81
See PRIZE COURT.

NEUTRAL - 56, 81, 347, 363, 408
See PRIZE COURT.

OWNERS — Cargo — Shipowners' claim against - - - - - 56
See PRIZE COURT.

—— Ship—Master—Authority - - 22
See SHIPPING.

PARTICULARS — Answer — Petition for restitution of conjugal rights - 439
See DIVORCE.

PASSING OF PROPERTY—Prize Court 385
See PRIZE COURT.

PAYMENT OUT—Prize Court - 1, 363
See PRIZE COURT.

PEACE TREATY — *German Claimants — Right to litigate Claim for Damages—Treaty of Peace between the Allied and Associated Powers and Germany*, 1919, *arts.* 296 *and* 297 — *Treaty of Peace Order*, 1919, *s.* 1, *sub-ss.* 16 *and* 17. THE MARIE GARTZ
Hill J. 172, 363
See PRIZE COURT.

PERMANENT MAINTENANCE—Divorce
See DIVORCE. 310

PETITION—Divorce.
See DIVORCE.

PLATE—Church—Faculty for sale of - 97
See ECCLESIASTICAL LAW.

PLEADING—Divorce—Particulars - 439
See DIVORCE.

POOR PERSON — Husband suing as — Security for wife's costs—Divorce
See DIVORCE. 206

PORT—Allied—Neutral vessels sailing from
See PRIZE COURT. 1

—— Custom of - - - - - - 370
See SHIPPING.

POWER—Appointment — Variation of marriage settlement—Divorce - 69
See DIVORCE.

PRACTICE—Admiralty.
See SHIPPING.

—— Divorce.
See DIVORCE.

—— Prize Court.
See PRIZE COURT.

—— Salvage actions - - - - 111
See SHIPPING.

PRIORITIES—Security for costs—Charging order - - - - - - 425
See PRIZE COURT.

PRIZE COURT—*Cargo—Bound to Enemy Base of Supply—Seizure after Armistice—Licence to Trade—Agreement of April* 20, 1918, *made between U.S.A. and Norway.* THE RANNVEIG - - - Duke, Pres. 177

2. —— *Cargo—Release of — Marshal's Expenses—Cost of Insurance—Prize Court Rules*, 1914, *O.* XIII., *r.* 6. THE CAIRNSMORE THE GUNDA - - - - Duke, Pres. 209

3. —— *Cargo — Release of — Marshal's Expenses—Sale pending Action for Condemnation — Investment of Proceeds — Release of Goods on Bail—Payment of Marshal's Expenses of Detention—Practice—Prize Court Rules*, 1914, *Order* XI., *r.* 3; *Order* XXVI., *r.* 1. THE DROTTNING SOPHIA
Duke, Pres. 200

PRIZE COURT—*continued.*

4. —— *Contraband—Carriage of—Innocent Shipowners—Discretion to award Freight.* THE PRINS DER NEDERLANDEN **Duke, Pres. 216**

5. —— *Contraband Cargoes — Ships on Time Charter — Knowledge of the Charterers and Masters—Condemnation of Ships.* THE KIM. THE BJÖRNSTJERNE BJÖRNSON. THE ALFRED NOBEL - - - **Duke, Pres. 319**

6. —— *Detention — Ship — Seizure of Cargo — Release of Cargo — Shipowners' Claims for Losses and Expenses—Innocent Cargo Owners—Damages not recoverable.* THE DOMALD - - - - **Duke, Pres. 56**

7. —— *Detention — Ship — Shipowners' Claim for Damages—Cargo Owners.* THE EINAR JARL - - **Lord Sterndale, Pres. [1920] P. 64n**

8. —— *Enemy controlled Company — Transfer of Share Capital to Neutrals — Enemy Cargo—Transfers in Transitu—Transhipment from Enemy to Neutral Vessels—Passing of Property.* THE VESTA **Duke, Pres. 385**

9. —— *Enemy Property — Sale to neutral Purchasers—Payment out of Proceeds—Reprisals Order in Council of March* 11, 1915—*Treaty of Versailles, art.* 297. THE OSCAR II. **Duke, Pres. 363**

10. —— *Enemy Vessel — Capture of—Neutral Territorial Waters—Capture made in Good Faith—Subsequent Loss of Vessel—Absence of Negligence—Claim by Neutral Government—Restitution in Value—XIIIth Hague Convention, art.* 3. THE VALERIA **Duke, Pres. 81**

11. —— *Enemy Vessels — Captures in Neutral Territorial Waters — Requisition — Vessels lost by Enemy Action—Claim for Restitution by Neutral Government—Treaty of Versailles, art.* 297—*Prize Court Rules,* 1914, *O.* XXIX. THE PELLWORM **Lord Sterndale, Pres.; Duke, Pres. 347**

12. —— *Naval Prize Tribunal—Combined Naval and Military Operations—Joint Captors—Division of Proceeds—Droits of the Crown and Droits of Admiralty—Naval Prize Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 30). THE FELDMARSCHALL - **Naval Prize Tribunal 289**

13. —— *Naval Prize Tribunal — Sums paid on Recommendation of Prize Claims Committee—Sums not recoverable in Prize Court—Naval Prize Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 30), *Sched., Pt. II., para.* 4. THE ADOLPH **Naval Prize Tribunal 333**

14. —— *Neutral Ship and Cargo—Barratrous Intention of Master—Design to take Ship to Enemy Port—Refusal by Crew—No overt Act.* THE TWEEAMBT - **Duke, Pres. 413**

15. —— *Neutral Vessels — Diversion — Damages against the Crown — Absence of reasonable Cause—Neutral Vessels sailing from Allied Port—Order in Council of February* 16, 1917—*Practice—Stay of Execution—Security for Costs—Payment out.* THE BERNISSE and THE ELVE - - **Lord Sterndale, Pres. 1**

16. —— *Prize Bounty — Battle of Jutland—Joint and Common Enterprise—Naval Prize Act,* 1864 (27 *&* 28 *Vict. c.* 25), *s.* 42—*Order in Council of March* 2, 1915. *In re* BATTLE OF JUTLAND - **Duke, Pres. 408**

17. —— *Release of Goods detained under Reprisals Order—Expenses of Detention—Insurance — Reprisals Order in Council of March* 11, 1915. THE UNITED STATES **Duke, Pres. 430**

18. —— *Requisition — Appraisement — Erroneous Basis of Valuation—Prize Court Rules,* 1914, *O.* XI. THE CONSUL OLSSON **Duke, Pres. 43**

19. —— *Security for Costs — Charging Order—Priorities—Costs of Procurator-General and Claimants' Solicitors—Solicitors Act,* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28. THE DIRIGO - - - - **Duke, Pres. 425**

PROBATE—*Will — Soldier's Will—Testamentary Intention — Codicil — Letter containing Instructions to alter Will — Interdependent disposition of Real as well as Personal Estate—Wills (Soldiers and Sailors) Act,* 1918 (7 *&* 8 *Geo.* 5, *c.* 58), *s.* 3.
Decision of Horridge J. [1919] P. 229 affirmed by Lord Sterndale M.R. and Warrington L.J.; Scrutton L.J. dissenting. GODMAN *v.* GODMAN - - - - **C. A. 261**

PROCESS—Arrest—Immunity from - **30**
See SHIPPING.

PROCURATOR-GENERAL — Costs — Prize Court - - - - - - **425**
See PRIZE COURT.

PUBLIC AUTHORITIES PROTECTION ACT, 1893 - - - - - - **104**
See SHIPPING.

PUBLIC VESSEL—Immunity from process of arrest - - - - - **30**
See SHIPPING.

REAL AND PERSONAL ESTATE—Interdependent disposition of—Soldier's will - - - - - - **261**
See PROBATE.

REASONABLE CAUSE—Absence of—Diversion of neutral vessels - - **1**
See PRIZE COURT.

REGISTER—Births and deaths—Right of public to inspect - - - **75**
See DIVORCE.

REGISTRAR—Divorce—Jurisdiction of **310**
See DIVORCE.

RELEASE—Cargo - **56, 200, 209, 430**
See PRIZE COURT.

REM—Writ in - - - - - **223, 236**
See SHIPPING.

REMOTENESS—Damage - - - 12
See SHIPPING.

RENEWAL—Writ - - - - 223
See SHIPPING.

REPRISALS ORDER IN COUNCIL 363, 430
See PRIZE COURT.

REQUISITION - - - - 43, 347
See PRIZE COURT.

RESPONDENT—Divorce.
See DIVORCE.

RESTITUTION—Claim for—Neutral Government—Vessels captured in neutral territorial waters - - - 347

RESTITUTION OF CONJUGAL RIGHTS — Petition—Answer—Particulars 439
See DIVORCE.

RIVER TYNE—Application of Regulations for preventing collisions at sea to
See SHIPPING. 187

RULES AND ORDERS—*Collisions at Sea, Regulations for Preventing, art.* 15 (*a*): THE TRANMERE - - 454

—— —— *art.* 16: THE CEYLON - 187

—— —— *arts.* 19, 21 *and* 27: THE KARAMEA 314

—— *Divorce Rules* 95, 121, 122, 181: FYFFE *v.* FYFFE - - - - 310

—— —— *r.* 158: SMITH *v.* SMITH AND RUTHERFORD - - - 206

—— *XIIIth Hague Convention, art.* 3: THE VALERIA - - - - 81

—— *Order in Council of March* 2, 1915 (*Naval Prize*): *In re* BATTLE OF JUTLAND 408

—— *Order in Council of March* 11, 1915 (*Reprisals*): THE OSCAR II. - 363

THE UNITED STATES - - 430

—— *Order in Council of February* 16, 1917: THE BERNISSE and THE ELVE 1

—— *Peace Treaty between the Allied and Associated Powers and Germany*, 1919, *arts.* 296 *and* 297: THE MARIE GARTZ - - - 172

THE MARIE GARTZ (No. 2) - 460

—— —— *art.* 297: THE PELLWORM - 347

THE OSCAR II. - - - 363

—— *Peace Treaty Order*, 1919, *s.* 1, *sub-ss.* 16 *and* 17: THE MARIE GARTZ - 172

THE MARIE GARTZ (No. 2) - 460

—— *Prize Court Rules*, 1914, *O.* XI.: THE CONSUL OLSSON - - - 43

—— —— *O.* XIII., *r.* 6: THE CAIRNSMORE. THE GUNDA - - - 209

—— —— *r.* 3; *O.* XXVI., *r.* 1: THE DROTTNING SOPHIA - - 200

—— —— *O.* XXIX.: THE PELLWORM - 347

RULES AND ORDERS—*continued.*

—— *Shipping Casualties and Appeals and Rehearing Rules*, 1907: THE CHELSTON - - **Div. Ct. (P. D. A.)** 400

—— *Supreme Court, Rules of, O.* VIII., *r.* 1: THE ESPANOLETO - - - 223

—— *Tyne By-laws*: THE CEYLON - 187

SALE—Church plate—Faculty for - 97
See ECCLESIASTICAL LAW.

—— Enemy property—Neutral purchasers
See PRIZE COURT. 363

SALVAGE - - - - 111, 442
See SHIPPING.

SECURITY FOR COSTS—Divorce - 206, 338
See DIVORCE.

—— Prize Court - - - 1, 425
See PRIZE COURT.

SEIZURE—Cargo - - - - 56
See PRIZE COURT.

SERVANTS—Crown—Action against - 104
See SHIPPING.

SERVICE—Affidavit—Divorce - - 40
See DIVORCE.

—— Citation - - - - - 242
See DIVORCE.

—— Petition—Minor - - - 65
See DIVORCE.

SETTLEMENT—Variation of—Divorce
See DIVORCE. 69, 310

SHIPPING—*Charterparty — Custom of Port —Custom inconsistent with Charterparty— "Cargo to be taken from alongside at charterers' expense as customary"—Exclusion of Evidence of Custom throwing Expense on Shipowner.* THE TURID - - **Div. Ct. (P. D. A.)** 370

2. —— *Collision—Bail — Statutory Limit of Liability—Right to Limit disputed—Amount of Bail—Practice.* THE CHARLOTTE 78

3. —— *Collision—Damages.* THE CHARLES LE BORGNE - - - **Hill J. 15n (1)**

4. —— *Collision — Damages — Demurrage—Delay due to waiting for Convoy—Remoteness of Damage.* THE VERASTON **Hill J. 12**

THE KAFUE - - **Hill J. 15n (2) 12**

5. —— *Collision — Damages — Foreign Currency—Rate of Exchange—Date of Conversion.* THE VOLTURNO - - **Hill J. 447; Affirmed on appeal C. A. 454n**

6. —— *Collision — Joint Tort Feasors — Damages for Loss of Life—Right of Contribution—Doctrine of Common Employment—Maritime Conventions Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 57). THE CEDRIC **Hill J. 193**

SHIPPING—*continued.*

7. —— *Collision — Limitation of Actions — Arrest of wrongdoing Vessel after Two Years — Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8. THE P.L.M. 8 **Hill J. 236**

8. —— *Collision — Navigation in Fog — Ferry Traffic in the Mersey—Special Fog Signals for Ferry Steamers — Practice—Regulations for preventing Collisions at Sea, art.* 15 (*a*). THE TRANMERE - **Hill J. 454**

9. —— *Collision — Navigation of Entrance to Montevideo Harbour—Rounding the Whistling Buoy—"Keep course and speed" — Regulations for preventing Collisions at Sea, arts.* 19, 21 *and* 27. THE KARAMEA **Hill J. 314**

10. —— *Collision — Public Authority — Servants of the Crown—Action against Commanding Officer of King's Ship—Limitation of Actions — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 51)—*Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.*8. THE DANUBE II. - - - **Hill J. 104**

11. —— *Collision — River Tyne—Application of Sea Regulations to—Tyne By-laws—Regulations for preventing Collisions at Sea, art.* 16. THE CEYLON - - - **Hill J. 187**

12. —— *Collision—Tug and Tow — Contract of Indemnity—Foreign Master—Ignorance of Terms of the Contract—Authority to bind Owners.* THE LUNA - - **Hill J. 22**

13. —— *Courts of Formal Investigation into Shipping Casualties — Notices of Investigation — Formulation of Charges—Cancellation and Suspension of Certificates—Shipping Casualties and Appeals and Rehearing Rules*, 1907—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 470—*Canada Shipping Act*, 1908 (7 & 8 *Edw.* 7, *c.* 65), *s.* 36. THE CHELSTON - **Div. Ct. (P. D. A.) 400**

14. —— *Limitation of Actions—Time for bringing in Claims—Statutory Limitation of Time — Discretion to extend Time—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8. THE DISPERSER **Hill J. 228**

15. —— *Limitation of Actions—Writ in rem—Res not within Jurisdiction—Renewal of Writ—Extension of Time — Practice — Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8—*O.* VIII., *r.* 1. THE ESPANOLETO - - - - - **223**

—— Prize Court.
See PRIZE COURT.

16. —— *Public Vessel — Immunity from Process of Arrest—Trading by Public Vessel.* THE PORTO ALEXANDRE - - **C. A. 30**

17. —— *Salvage — Action—Tenders in—Lump Sum Tender to separate Salvors—Costs—Separate Representation of Master and Crew—Practice.* THE CRETEFOREST - **Hill J. 111**

SHIPPING—*continued.*

18. —— *Salvage—Limitation of Actions—Defences based on Statutes of Limitation—Unconditional Appearance to Writ—Waiver—Discretionary Powers — Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8. THE LLANDOVERY CASTLE - - **Hill J. 119**

19. —— *Salvage—Services rendered by Ship belonging to His Majesty — Cable-laying Ship—Ship "specially equipped with salvage plant"—Merchant Shipping (Salvage) Act*, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1. THE MORGANA - - - - - - **Hill J. 442**

SOLDIER'S WILL - - - - **261**
See PROBATE.

SOLICITOR — *Collision — Enemy - owned Vessel — Treaty of Versailles*, 1919, *arts.* 296 *and* 297—*Treaty of Peace Order*, 1919, *para.* 1, *sub-ss.* 16, 17—*Charging Order — Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28. THE MARIE GARTZ (No. 2) - - - **Hill J. 460**

SOLICITORS—Claimants' — Costs — Prize Court - - - - - - **425**
See PRIZE COURT.

STATUTES:—
IMPERIAL.

1836.

6 & 7 Will. 4, c. 86 (Births and Deaths Registration), s. 35: BEST *v.* BEST AND MCKINLEY - - - **75**

1857.

20 & 21 Vict. c. 85 (Matrimonial Causes), ss. 27, 28, 33, 42: RUSH *v.* RUSH, BAILEY AND PIMENTA - **C. A. 242**

—— —— s. 31: WILSON *v.* WILSON - **20**

—— —— s. 33: BUTTERWORTH *v.* BUTTERWORTH AND ENGLEFIELD - **126**

1859.

22 & 23 Vict. c. 61 (Matrimonial Causes), s. 5: WILLIAMS *v.* WILLIAMS AND KILBURN - - - - - **69**

1860.

23 & 24 Vict. c. 127 (Solicitors), s. 28: THE DIRIGO - - - - **425**
THE MARIE GARTZ (No. 2) - **460**

1864.

27 & 28 Vict. c. 25 (Naval Prize), s. 42: *In re* BATTLE OF JUTLAND - **408**

1874.

37 & 38 Vict. c. 88 (Births and Deaths Registration), s. 44: BEST *v.* BEST AND MCKINLEY - - - **75**

1893.

56 & 57 Vict. c. 51 (Public Authorities Protection): THE DANUBE II. - **104**

1894.

57 & 58 Vict. c. 60 (Merchant Shipping), s. 470: THE CHELSTON **Div. Ct. (P. D. A.) 400**

—— —— s. 503: THE CHARLOTTE - **78**

—— ——ss. 503, 504: THE DISPERSER **228**

STATUTES—*continued.*

1911.

1 & 2 Geo. 5, c. 57 (Maritime Conventions). THE CEDRIC - - 193

—— s. 8: THE DANUBE II. - 104

THE DISPERSER - - - 228

THE ESPANOLETO - - 223

THE LLANDOVERY CASTLE - 119

THE P.L.M. 8 - - - 236

1916.

6 & 7 Geo. 5, c. 41 (Merchant Shipping (Salvage)), s. 1: THE MORGANA 442

1918.

7 & 8 Geo. 5, c. 58 (Wills (Soldiers and Sailors)), s. 3: GODMAN *v.* GODMAN **C. A. 261**

8 & 9 Geo. 5, c. 30 (Naval Prize): THE FELDMARSCHALL **Naval Prize Tribunal 289**

—— Sched., Pt. II., para. 4: THE ADOLPH **Naval Prize Tribunal 333**

COLONIES.

1908.

7 & 8 Edw. 7, c. 65 (Canada Shipping), s. 36: THE CHELSTON **Div. Ct. (P. D. A.) 400**

STATUTORY LIMIT—Liability—Shipping—Bail - - - - - - 78
See SHIPPING.

STAY OF EXECUTION—Prize Court - 1
See PRIZE COURT.

TENDER—Salvage actions - - 111
See SHIPPING.

TERRITORIAL WATERS—Neutral **81, 347**
See PRIZE COURT.

TESTAMENTARY INTENTION - - 261
See PROBATE.

TIME—Limitation of - - - 223, 228
See SHIPPING.

TIME CHARTER - - - - 319
See PRIZE COURT.

TOW—Tug and - - - - - 22
See SHIPPING.

TRADING—Public vessel - - - 30
See SHIPPING.

TRANSFER—Property—Prize Court - 385
See PRIZE COURT.

TRANSHIPMENT—From enemy to neutral vessels—Prize Court - - 385
See PRIZE COURT.

TREATY OF PEACE.
See PEACE TREATY, PRIZE COURT and SOLICITOR.

TUG AND TOW - - - - - 22
See SHIPPING

TYNE BY-LAWS - - - - 187
See SHIPPING.

USUAL ORDER—Wife's costs—Divorce 338
See DIVORCE.

VALUATION—Erroneous basis of — Requisition—Appraisement - - 43
See PRIZE COURT.

VARIATION—Settlement - - 69, 310
See DIVORCE.

VERSAILLES, TREATY OF.
See PEACE TREATY and PRIZE COURT.

WAIVER—Unconditional appearance to writ
See SHIPPING. 119

WIFE—Costs—Divorce - - - 71
See DIVORCE.

WILL—Probate - - - - 261
See PROBATE.

WORDS—"Cargo to be taken from alongside at charterers' expense as customary": THE TURID **Div. Ct. (P. D. A.) 370**

—— "Keep course and speed": THE KARAMEA - - - - 314

—— "Specially equipped with salvage plant": THE MORGANA - 442

WRECK COMMISSIONER'S COURT — Canada - - - - - 400
See SHIPPING.

WRIT—Unconditional appearance - 119
See SHIPPING.

WRIT IN REM—Admiralty - 223, 236
See SHIPPING.

PRINTED BY
W. SPEAIGHT AND SONS, LTD., FETTER LANE, LONDON, E.C. 4.

THE

LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

KING'S BENCH DIVISION AND PROBATE DIVISION.

(Including Bankruptcy, Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

1920.—Vol. III. K.B. & P.

3 K.B. (p. 161 to p. 386); P. (p. 361 to p. 384).

Part X.—October 6.

TABLE OF CASES.

KING'S BENCH DIVISION.

	PAGE
Binney *v.* Inland Revenue Commissioners	348
Cheshire & Co. *v.* Vaughan Bros. & Co. (C.A.)	240
Crook *v.* Pritchard	377
Everett *v.* Griffiths (C.A.)	163
Foster, *In re.* Barnato *v.* Foster (C.A.)	306
Gillette Safety Razor *v.* Inland Revenue Commissioners	358
Great Western Ry. Co. *v.* Bater	266
Jones *v.* Newtown and Llanidloes Guardians	381
Magnhild (S.S.) *v.* McIntyre Bros. & Co.	321
Mersey Docks and Admiralty Commissioners, *In re*	223
Phillips *v.* Kershaw, Leese & Co. (C.A.)	297
Rex *v.* Crane (C.C.A.)	236
Rex *v.* Housing Appeal Tribunal	334
Smidth & Co. *v.* Greenwood	275
Wankie Colliery Co. *v.* Inland Revenue Commissioners	287
Wyndham (Lady) *v.* Inland Revenue Commissioners	260

PROBATE DIVISION.

	PAGE
Oscar II., The	363
Perry *v.* Perry	361
Turid, The	370

For Mode of Citation, see Beginning of Index.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED by THE COUNCIL at its office, 30, MONTAGUE STREET. LONDON, W.C. 1.

AND

Printed by W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

"The Law Reports, 1920," for October consist of—

Chancery Division	Part X.
King's Bench and Probate Divisions	Part X.
Statutes	Part I.

Editor—Rt. Hon. Sir FREDERICK POLLOCK, Bart., K.C.

Assistant Editor of Current Digest—His Honour Judge J. R. V. MARCHANT.

Assistant Editors of Weekly Notes { FRANK EVANS, F. O. ROBINSON, } *Barristers-at-Law.*

Reporters:

House of Lords	H. B. Hemming,	*Barrister-at-Law.*
Privy Council	A. M. Talbot,	*Barrister-at-Law.*
Court of Appeal, No. 1 ..	G. A. Streeten, W. Ivimey Cook,	*Barristers-at-Law.*
Court of Appeal, No. 2 ..	W. F. Barry, W. H. Griffith,	*Barristers-at-Law.*
Mr. Justice Eve .. .. AND Mr. Justice Peterson ..	George Macan, R. Morrison,	*Barristers-at-Law.*
Mr. Justice Sargant .. AND Mr. Justice Russell ..	Frank Evans, Arthur Lawrence,	*Barristers-at-Law.*
Mr. Justice Astbury .. AND Mr. Justice P. O. Lawrence	G. R. Alston, H. L. Fraser,	*Barristers-at-Law.*
	H. C. Garsia,	*Barrister-at-Law*
King's Bench Court of Criminal Appeal Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases.	J. F. Clerk, F. O. Robinson, J. E. Aldous, J. S. Henderson, R. F. Stubbing, J Ritchie,	*Barristers-at-Law.*
Bankruptcy Cases.. ..	J. E. Aldous,	*Barrister-at-Law.*
Probate and Divorce ..	J. R. Brooke,	*Barrister-at-Law.*
Admiralty Cases	E. C. Trehern,	*Barrister-at-Law.*
Ecclesiastical Cases ..	C. F. Jemmett,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Digest 1911-1920.

The Council will publish in 1921 a Digest of all cases reported during the ten years 1911-1920 (inclusive). The number of COPIES to be PRINTED will be LIMITED and these will be sold at THREE GUINEAS EACH. Subscribers desiring to purchase copies should pay for them when renewing their subscriptions to the Law Reports and not later than 31st January 1921.

The Subscription List for 1921 is now open and will close on 31st January, 1921.

THE LAW REPORTS, 1921, Unbound.

	£	s.	d.
ENTIRE SERIES (including Statutes, Weekly Notes, and Complete Current Digest). Prepaid Subscription if paid before 1st February, 1921	4	4	0
After 31st January, 1921	5	5	0
COMPLETE CURRENT DIGEST, 1921 (a Digest, issued quarterly, of all reported cases) (unbound)	1	0	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)	3	0	0
DECENNIAL DIGEST, 1891-1900 (in cloth)	1	10	0
DECENNIAL DIGEST, 1901-1910 (in cloth)	1	10	0
DECENNIAL DIGEST, 1911-1920 (a Digest of all reported cases) (in cloth) ..	3	3	0
WEEKLY NOTES, 1921 (unbound)	1	10	0
INDIAN APPEALS, 1921—			
Prepaid Subscription if paid before 1st April, 1921 (unbound)	1	1	0
After 31st March, 1921 (unbound)	1	5	0
INDIAN APPEALS. Digest, 1874-1893 (in cloth)	0	11	6

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS.		WEEKLY NOTES.	
		Notes of Cases.	Notes of Cases and Miscellaneous.
Cloth .. .. .. 6s. 9d. per Vol.	Cloth	7s. 3d. ..	7s. 9d.
Half-Calf .. .. 10s. 9d. „	Half-Calf ..	11s. 6d. ..	12s. 3d.
Half-Morocco .. .. 11s. 6d. „	Half-Morocco	12s. 9d. ..	13s. 3d.
Calf .. .. .. 15s. 0d. „	Calf	16s. 6d. ..	17s. 9d.

When the Subscriber's address is more than four miles from the Law Courts a charge of 5s. 6d. is made for cost of carriage of bound Volumes for the Year.

Until 31st January, 1921, the Council will accept subscriptions for binding the 1921 Volumes of the *Law Reports* at the prices above-mentioned. Unbound parts should be sent to be bound as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made.

The back Years of the *Law Reports* since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes*, for 1891 to 1914, the *Indian Appeals* for 1889-1893 and the *Law Reports* 1918 are out of print.

All sums payable to the Council must be prepaid, and (unless a Bankers' Order has been given) should be remitted direct to the Secretary.

Cheques and Money Orders should be made payable to the Council and crossed " & Co., not negotiable." *Banker's Commission must be added to the amount of the Subscription, in case of every remittance from Ireland, Scotland, the Isle of Man, the Channel Islands and Abroad, unless the remittance is made payable in London.*

COMMUNICATIONS should be addressed to

THE SECRETARY, COUNCIL OF LAW REPORTING,
30, Montague Street, London, W.C.1.

"THE RED BOOK"

The Yearly Practice of the Supreme Court 1921.

Edited by

SIR WILLES CHITTY

and

H. C. MARKS, Esq.

Complete, 2 Vols. in 1. Price : **50s.** net. Postage : 1s. 3d. extra.

This famous work is this year issued in complete form, is thoroughly revised and brought up-to-date, and is an essential to the modern lawyer.

SPECIAL NOTICE.—This work is included in the Yearly Legal Practices at a greatly reduced rate. Write for particulars to

BUTTERWORTH & CO., Bell Yard, Temple Bar.